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In The Supreme Court of the United States

ROBIN R. SZELIGA and
ROBERT S. WOODRUFF,

Petitioners,

vs.

STATE OF NEW JERSEY, DEPARTMENT
OF FINANCE, DIVISION OF INVESTMENT,
BY TREASURER JOHN E. MCCORMAC,

Respondent.

On Petition For Writ Of Certiorari
To The Superior Court Of New Jersey
Appellate Division

PETITION FOR WRIT OF CERTIORARI

ANDREW T. BERRY
JOSEPH T. BOCCASSINI
JAMES C. SHEIL
MCCARTER & ENGLISH, LLP
Four Gateway Center,
100 Mulberry Street
Newark, New Jersey
07102-4096
(973) 622-4444

Counsel for Petitioners

VINCENT J. MARELLA
Counsel of Record
MARK T. DROOKS
THOMAS V. REICHERT
BIRD, MARELLA, BOXER,
WOLPERT, NESSIM, DROOKS
& LINCENBERG, P.C.
1875 Century Park East,
23rd Floor
Los Angeles, California
90067-2561
(310) 201-2100

Counsel for Robin R. Szeliga

DAVID LAWRENCE COOK, ESQ.
CLIFFORD CHANCE US LLP
31 W. 52nd Street
New York, New York
10019-6131
(212) 878-8000

Counsel for Robert S. Woodruff

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Plaintiff State of New Jersey brought a fraud suit against, *inter alia*, two former chief financial officers of Colorado-based Qwest Communications International, Inc., alleging they provided false financial information about Qwest in Qwest's press releases and SEC filings. Petitioners are Colorado residents. The New Jersey Appellate Division held that it was reasonable to exercise personal jurisdiction over petitioners because, although the SEC filings and press releases were not expressly directed by petitioners towards New Jersey, petitioners knew New Jersey was a significant investor and it was foreseeable that investors could rely on this information and suffer harm. The Appellate Division also held that, even if petitioners did not personally know that these materials were being provided to plaintiff, jurisdiction was proper under the conspiracy theory of personal jurisdiction.

The questions presented are:

1. Does it violate Due Process for a forum State to exercise jurisdiction over an individual where the individual does not expressly aim any conduct towards the forum State, but the individual is aware that the plaintiff is receiving allegedly false information in the forum State and it is foreseeable that it may suffer injury, i.e., is foreseeability of harm enough, resolving the unanswered question of *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987)?

QUESTIONS PRESENTED – Continued

2. Notwithstanding the statement in *Calder v. Jones*, 465 U.S. 783, 790 (1984), that "[e]ach defendant's contacts with the forum State must be assessed individually," does it violate Due Process for a forum State to exercise jurisdiction over an alleged conspirator based on the contacts with the State of a co-conspirator?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Appellate Division were:

Petitioners **Robert Woodruff** and **Robin Szeliga**, both individuals and residents of the State of Colorado;

Philip Anschutz, who is filing a separate petition; and

Respondent **State of New Jersey, Department of Treasury, Division of Investment**.

Although not a party to this petition, the underlying case involves allegations of fraud relating to statements made by officers and directors of **Qwest Communications International, Inc.** concerning Qwest's financial performance.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

The opinion of the Appellate Division of the New Jersey Superior Court (App. 1) is published at 387 N.J. Super. 487, 904 A.2d 786 (N.J. Sup. Ct. App. Div. 2006). The decision of the New Jersey Superior Court (App. 21) is unpublished. The order of the New Jersey Supreme Court denying review (App. 46) is also unpublished.

BASIS FOR SUPREME COURT JURISDICTION

The Appellate Division of the New Jersey Superior Court filed its published opinion on August 18, 2006. (App. 1.) After their motion for reconsideration was denied, petitioners filed a motion for leave to appeal to the New Jersey Supreme Court, which denied the motion on December 8, 2006. (App. 46.) The present petition is timely filed under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1.

This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV, Due Process Clause.

STATEMENT OF THE CASE

Plaintiff is the State of New Jersey's Division of Investment (the "Division"). Defendant Qwest Communications

International, Inc. ("Qwest") is a Delaware corporation, headquartered in Colorado. Qwest is a telecommunications company, one of the "Baby Bells"; its shares trade on the New York Stock Exchange. Between April 1999 and December 2001, the Division alleges that it purchased seven million shares of Qwest. (App. 5.)

The Division brought suit in New Jersey Superior Court alleging fraud, negligent misrepresentation, breach of fiduciary duty, and conspiracy against Qwest and certain of its current and former officers and directors. The Division claims to have bought Qwest stock "at prices artificially inflated by defendants' fraudulent and wrongful acts." The defendants include petitioners Robert Woodruff and Robin Szeliga.

Robert Woodruff is a Colorado resident who served as Qwest's Chief Financial Officer ("CFO") until he left the company on March 2, 2001. (App. 6, 9.) Robin Szeliga is a Colorado resident who became acting CFO and then CFO following Woodruff's retirement. (App. 9.) Neither of the petitioners has ever lived in New Jersey, or owned or leased any property in New Jersey. They have no bank accounts, no telephone listings or offices in New Jersey, or any of the other contacts that normally are necessary predicates to an exercise of general jurisdiction. (App. 47-48, 51.) Furthermore, neither of the petitioners has ever personally met with, called, written, or sent any documents to plaintiff. (App. 48, 51.)[1]

[1] One of plaintiff's employees dialed into a conference call that Qwest held for investors and analysts in June 2001 during which Mrs. Szeliga spoke. However, Mrs. Szeliga was not aware this person was on the call, and the employee did not speak on the call or call attention to himself in any way.

The operative First Amended Complaint alleges that Qwest and the defendants made numerous false and misleading statements relating to the business and financial condition of Qwest in the reports that Qwest filed with the U.S. Securities and Exchange Commission ("SEC") in Washington, D.C.; in press releases that Qwest issued in Denver, Colorado; and in other statements or conference calls that generally originated in Colorado. The complaint alleges that the Division relied on these false statements in deciding to purchase Qwest stock, and that it subsequently was injured when the alleged truth came to light and the price of Qwest securities fell. The Division alleges damages in excess of two hundred million dollars.

Woodruff and Szeliga (among others) timely moved to dismiss the complaint for lack of personal jurisdiction. Following jurisdictional discovery, the New Jersey Superior Court granted the motion to dismiss as to one defendant, but denied it as to the others, including petitioners. (App. 21.) To support its exercise of jurisdiction, the Superior Court specifically relied on *Charles Gendler & Co. v. Telecom Equipment Corp.*, 102 N.J. 460 (1986), and the "stream of commerce" theory of personal jurisdiction that has developed in product liability litigation, analogizing Qwest's stock to a product and holding that allegedly fraudulent securities filings with the SEC could be said to have been purposefully directed to each jurisdiction in which an investor resided. (App. 32-33, 36-38.)

The Appellate Division granted petitioners' motion for discretionary leave to appeal by Order dated January 26,

2005.[2] In its published opinion, the Appellate Division affirmed the Superior Court's decision but relied on purportedly different grounds. (App. 1.) Like the Superior Court, the Appellate Division's principal justification was that, although there were only incidental actual contacts between the petitioners and New Jersey (and no contacts between petitioners and the specific plaintiff in question), New Jersey's courts could exercise specific personal jurisdiction over petitioners because it was foreseeable that investors, including those in New Jersey, would be harmed by allegedly false information contained in regulatory documents that petitioners signed and that Qwest filed with the Securities and Exchange Commission in Washington, D.C., as well as by false information contained in press releases quoting petitioners that Qwest released in Colorado. The Appellate Division held that these materials created a "basis for an inference" that defendants expected the information to have an impact on the "recipient-investors who were the targets, wherever they might be located," and that the presence of one such targeted recipient-investor in New Jersey permitted New Jersey to exercise jurisdiction over petitioners. (App. 14-15.)[3]

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[2] Another defendant, Colorado resident Philip Anschutz, Qwest's founder and a non-officer director of Qwest, participated in the personal jurisdiction appeal. The Appellate Division affirmed the trial court's ruling permitting an exercise of jurisdiction over him as well. Because the Appellate Division's opinion treated him, as a non-executive director, somewhat differently than it did CFOs Woodruff and Szeliga, Mr. Anschutz is filing a separate petition for a writ of certiorari.

[3] "New Jersey's long-arm rule permits courts to exercise personal jurisdiction to the fullest extent allowed under the United States Constitution. *See* R. 4:4-4(b)(1); *Avdel Corp. v. Mecure*, 58 N.J. 264, 268 (1971)." (App. 10.)

The Appellate Division focused on the fact that "[f]raudulent communications are at the center of this controversy. [The Division's] claims are based on its assertion that it was injured as a consequence of intentionally false statements about the financial health of Qwest [made in SEC filings and press releases] that were disseminated in this State and upon which [the Division] relied in investing public funds." (App. 11.)

> The dissemination to [the Division], an institutional investor of public funds, was accomplished through a division of Qwest established for the very purpose of addressing questions and concerns of investors. There is a basis for an inference that Anschutz, Woodruff and Szeliga were aware of this system for dissemination and expected it to have an impact on the recipient-investors who were the targets, wherever they might be located.

(App. 14-15.)[4] The Appellate Division went on to point out that Qwest's investor relations division "maintained lists of large investors. [The Division] appeared on that list; at one relevant point [it] was ranked among the top thirty-five institutional investors. A copy of that list was sent to Szeliga, and Woodruff acknowledged that he had access to information about top investors if he needed it." (App. 15.) The court concluded that Woodruff and Szeliga "were specifically aware that [the Division] was a major investor and would suffer particular harm." (App. 15.)

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[4] While the Superior Court's opinion equated Qwest's *stock* to a product that enters the stream of commerce, the Appellate Division shifted this analysis but used the same framework, equating Qwest's *financial statements and press releases* to a product that enters the stream of commerce.

The Appellate Division effectively ruled that anyone who signs a regulatory filing on behalf of a publicly-traded corporation or who is quoted in a corporation's press releases is subject to jurisdiction "wherever" in the world an investor "might be located." (App. 15.) As the record and the opinion reveal, there is no evidence that Woodruff or Szeliga ever personally "directed" anything at plaintiff, and no evidence that any actions (much less the "fraudulent communications" at the "center of this controversy") were "aimed at" plaintiff.[5] All of the allegedly false statements were contained in SEC filings or press releases, or made on investor/analyst conference calls, none of which were personal to plaintiff or personally directed towards plaintiff or towards New Jersey. Yet this conduct was enough, according to the Appellate Division, to support an exercise of personal jurisdiction – particularly when coupled with the fact that Woodruff and Szeliga were aware that the Division was an investor. This knowledge and the foreseeability of potential harm, without specific action aimed at the forum, were sufficient to support an exercise of jurisdiction.

Finally, in response to petitioners' arguments that they had no direct contacts with plaintiff, the Appellate Division held that, since petitioners had been sued for conspiracy and had been alleged to be part of a conspiracy to harm plaintiff, they could be held answerable based on a conspiracy theory of personal jurisdiction, under which

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[5] The record will reflect that plaintiff signed up through Qwest's investor relations department to receive emails containing press releases and regulatory filings, and that plaintiff did subsequently receive such materials – from Qwest, petitioners' employer, not from petitioners themselves.

the acts of a conspirator may be attributed to other members of the conspiracy for both liability purposes as well as jurisdictional purposes, such that personal jurisdiction could be asserted based on a co-conspirator's contacts, not just the individual's, with the forum. (App. 16-18.) In so holding, the Appellate Division placed New Jersey on one side of an increasing split of authority on this question.

The New Jersey Supreme Court denied petitioners' motion for leave to appeal on December 8, 2006. (App. 46.)

REASONS FOR GRANTING THE PETITION

The Appellate Division's ruling raises serious questions regarding the power of a forum State to exercise jurisdiction over non-resident corporate officers based solely upon statements made in their employer's regulatory filings and press releases. The opinion below allowed New Jersey to exercise jurisdiction over these defendants even though they had no direct contact with the plaintiff, and with no evidence that they specifically targeted plaintiff or New Jersey. Knowledge that the Division was an investor (a conclusion that is contested by defendants but we will take as true for these purposes) was sufficient, along with foreseeability that investors, wherever in the world they resided, could be harmed.

Under this approach, corporate officers can be sued by investors in any jurisdiction in which an investor resides. This inverts the traditional inquiry of Due Process jurisprudence to focus on the plaintiff, rather than the defendant, and results in a vast expansion of the power of the States to exercise jurisdiction over distant defendants irrespective of the relationship of the defendant to the

forum. The opinion offers no limiting rule, which means that any corporate officer or director is open to suit in any jurisdiction – accepting employment means submitting to suit anywhere in the world an investor resides.

If a defendant is being sued for conduct that was committed outside the forum that is attempting to exercise jurisdiction, the law historically has required that the defendants must have directed the conduct towards the state, or made a particular effort to invoke the benefits and burdens of that state's laws, in order to make an exercise of jurisdiction reasonable. Here, the Appellate Division imposed no such limiting requirement, and in doing so exceeded the bounds of the Due Process Clause.

This ruling is extremely troubling with regard to the ability of corporate shareholders to hale corporate officers and directors into their local courts to defend securities suits even where there is no connection between the defendant and the forum. However, at a broader level, it also presents a serious danger because it extends a controversial and constitutionally-uncertain doctrine that has largely been restricted to product liability cases – whether mere awareness or "foreseeability" that a product (or, here, information) will end up in a forum State is a sufficient basis for an exercise of jurisdiction – into the new area of securities litigation.

The Appellate Division concluded that Mr. Woodruff and Mrs. Szeliga were aware that the Division was an investor that could potentially be harmed by the dissemination of false information, and that this justifies an exercise of jurisdiction over them in New Jersey. This raises a question that previously was addressed by this Court in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), but as to

which no majority could agree: can a forum exercise jurisdiction over a non-resident defendant where the defendant is aware or can foresee that its actions will have a result in the particular forum, but takes no other action specifically directed towards the forum? The Court split 4-4-1 on that question in *Asahi*; this case revisits the same question in a different factual context.

As a second basis for its holding, the Appellate Division relied on plaintiff's allegation of conspiracy to permit an exercise of jurisdiction over these defendants by permitting the forum-related contacts of one alleged conspirator to be attributed to another for purposes of personal jurisdiction. In doing so, the Appellate Division took one side in a split of federal and state authority regarding whether it violates Due Process considerations to allow an exercise of jurisdiction over one alleged conspirator based on contacts with the forum State of a co-conspirator.

This Court has never addressed this issue, and the Appellate Division's decision conflicts with this Court's prior holdings that each defendant's conduct must be individually assessed to determine whether jurisdiction properly can be asserted. There is a significant split of authority among the state courts and lower federal courts on this question, and it would be beneficial for this Court to provide guidance on whether conspiracy allegations can support an exercise of jurisdiction, and also what level of evidence is necessary to support haling a defendant into a forum's courts based on such allegations.

A. The Opinion Below Eviscerates The Due Process Constraints On A Forum's Exercise Of Personal Jurisdiction Over Non-Resident Corporate Officers And Directors.

The Due Process Clause "operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants. . . . The existence of personal jurisdiction, in turn, depends upon . . . a sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum." *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978). This limitation

> can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980); *accord Hanson v. Denckla*, 357 U.S. 235, 251 (1958) ("Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.").

The general standard for measuring personal jurisdiction was articulated in *International Shoe v. Washington*, 326 U.S. 310 (1945), which stated that the forum State may exercise personal jurisdiction over a non-resident defendant only if the defendant has certain "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice. *Milliken v. Meyer*, 311 U.S. 457,

463 (1940).'" *Id.* at 316. In *Hanson v. Denckla*, the Court emphasized that the inquiry focuses on the *defendant* and the defendant's conduct, which provides the principal (although not exclusive) measure for judging the reasonableness of an exercise of jurisdiction.

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Hanson, 357 U.S. at 253. As the Court subsequently summarized, the "central concern of the inquiry into personal jurisdiction" is directed to "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

Given the complex nature of modern economic life and the relatively high level of generality at which, by necessity, these sorts of rules must be articulated, there have been a number of recurring situations in which it has been difficult to apply these standards. One vexing issue – which is one of the two issues that this case raises – has been how to apply this inquiry where the conduct that forms the basis for the plaintiff's claim occurs outside the forum State but has an effect inside the State.[6] This question has been addressed in

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[6] We assume, *arguendo*, that the harm occurred in New Jersey. In a case like this, in which the harm relates to securities traded on a national exchange, it is not altogether clear that the harm occurs in

(Continued on following page)

the context of both intentional torts and product liability litigation. In both areas, the principal questions have concerned whether the conduct of the defendant giving rise to the claim was directed towards the forum and whether the harm was naturally foreseeable. This case revisits these questions in a pointed manner.

1. The Opinion Below Dispenses With The Requirement That A Non-Resident Defendant's Conduct Must Have Been "Expressly Aimed" At The Forum In Order To Support An Exercise Of Jurisdiction.

In the area of intentional torts, the leading case is *Calder v. Jones*, 465 U.S. 783 (1984). *Calder* was a defamation case by entertainer Shirley Jones, a California resident, against the *National Enquirer* magazine as well as a reporter and an editor. The magazine, editor and reporter were located in Florida, and did the bulk of their reporting for the story in question from Florida. Ms. Jones brought suit in Superior Court in California, and the individual defendants challenged that court's jurisdiction over them. The California courts found jurisdiction, and this Court affirmed.

In affirming, the Court applied *Shaffer's* instruction to focus on the relationship among the defendant, the forum and the litigation and found that, even though the work on the article was performed in Florida and the article was published there, the individual defendants' activities in

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New Jersey. Here, Qwest shares trade on the NYSE, and the SEC filings occurred in Washington, D.C. The fact that the Division is in New Jersey does not automatically mean the harm occurred there when the question involves alleged fraud affecting the price of shares in public companies.

relation to California made it reasonable to require them to answer the claims in a California forum.

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California.

465 U.S. at 788-89 (footnote omitted). The Court rejected the defendants' attempt to analogize themselves to a welder who works on a product for an employer but has no control over the ultimate disposition of the product.

> Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article.

Id. at 789-90 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

It is impossible to square the reasoning of *Calder* with the facts of this case. In the case at bar, the Appellate Division invoked *Calder* and a variety of state-court cases of similar ilk to hold that petitioners could be held to answer plaintiff's claims in New Jersey. But the facts here are starkly different from those in *Calder*, and the result reflects an unwarranted extension of the law such that the "express aiming" component that was a significant factor in *Calder* is wholly discarded here. As the Appellate Division notes in its opinion,

> [The Division's] claims are based on its assertion that it was injured as a consequence of intentionally false statements about the financial health of Qwest that were disseminated in this State and upon which [the Division] relied in investing public funds. . . . The crux of the cause of action is the dissemination of fraudulent statements into this State that caused harm to [the Division] here.

(App. 11.) Under this Court's prior holdings, this is insufficient. This is not a case, like *Calder*, that involves a specific focus on or locus in New Jersey. Here, the allegedly "fraudulent communications" that are the "crux of the cause of action" consist of press releases about Qwest that were released by Qwest in Colorado; mandatory filings by Qwest with the SEC in Washington, D.C.; and, in the case of Mrs. Szeliga, statements she made in an investor conference call that originated in Denver, Colorado and was open to public participation. (App. 5, 6, 9-10.)

The facts of this case are distinct from those of *Calder* and cases of its ilk in four ways. First, the substance of the allegedly false statements had nothing to do with New Jersey or this plaintiff; they did not "concern the [New

Jersey] activities of a [New Jersey] resident." Second, the allegedly fraudulent statements did not arise peculiarly from New Jersey or conduct in New Jersey. Third, the allegedly fraudulent statements were not "expressly aimed at [New Jersey]"; to the contrary, New Jersey reached out to obtain these materials (from *Qwest*) outside the forum. Finally, the brunt of the harm was not suffered in New Jersey. The Division was but one investor in Qwest among many thousands. As the Appellate Division's opinion reflects, New Jersey is listed in shareholder records only as, at one point, Qwest's thirty-fifth largest institutional investor. (App. 15.) The harm suffered from allegedly false statements about Qwest's financial health was suffered in equal measure by all shareholders; the Division is no different from investor thirty-four, thirty-six or one hundred thirty-six.

The Appellate Division's published opinion makes new and dangerous law by focusing on the plaintiff's actions, rather than the defendant's, for purposes of its jurisdictional analysis. The opinion holds that corporate officers and directors can be sued for statements made in press releases issued by the corporation and in securities filings in Washington, D.C. anywhere an *investor* resides. Nothing about the petitioners' conduct was particular to New Jersey; nothing was expressly aimed either at New Jersey or at this plaintiff. Yet the transmission of this information *by* Qwest *about* Qwest to this investor-plaintiff in this forum has now been held to support jurisdiction against these individuals. This means that it is reasonable for these Colorado residents to have to defend this case in New Jersey, even though there is nothing that makes New Jersey a more appropriate forum than Alaska, or Maine, except that this investor, a state agency, is a New Jersey entity. This upends the traditional focus on the relationship among the defendant, the forum,

and the litigation in favor of a focus on the *plaintiff*, the forum, and the litigation.

In its opinion, the Appellate Division acknowledges that the allegedly fraudulent information that forms the gravamen of plaintiff's complaint was contained in press releases and in SEC filings – materials that are not "personal" to this plaintiff in any respect – but holds, quixotically, that New Jersey was "the focal point of a harm [the Division] suffered as a consequence of the intentional tort aimed at [the Division] in this State." (App. 16.) This proves too much – if this is true of New Jersey, it is true of every investor who obtained Qwest's press releases and SEC filings. How could one filing in Washington, D.C. be aimed at every investor everywhere? To be sure, each investor is the focal point of *its own* harm, but that is not the appropriate inquiry. Unlike *Calder*, the alleged harm here does not rest with one particular individual; it is distributed across a large pool of investors from many jurisdictions. The fact that each suffered harm should not make a corporate officer amenable to suit in each forum in which an investor resides.

As noted above, limitations on personal jurisdiction serve two purposes: First, from the perspective of the defendant, they protect him or her from being haled into a distant court unless there is a connection between the defendant's actions and the forum that makes it reasonable. They are designed to eliminate arbitrariness, *Kulko*, 436 U.S. at 93, and "allow[] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. Second, from the perspective of the "principles of interstate federalism embodied in the Constitution," *id.*

at 293, the doctrine of personal jurisdiction imposes limitations on a State's ability to exercise power over non-residents who are being sued in its courts. *Hanson*, 357 U.S. at 251; *Shaffer*, 433 U.S. at 213-16.

The Appellate Division's opinion violates the first purpose in its reasoning and the second in its result. In this case, petitioners are being sued not because of anything they did that was directed towards New Jersey or to the particular New Jersey plaintiff, but because they were quoted in corporate press releases or signed corporate securities filings that found their way into New Jersey without the individual defendants' direction or active participation. There is nothing that distinguishes this plaintiff from any other.[7] Based on the allegations of the plaintiff in this case, there is nothing that makes New Jersey different from any other state,[8] and the reasoning of this opinion could be articulated by almost any state or foreign court. The opinion shrugs off all restrictions on the State's exercise of power. Under this opinion, any corporate officer or director of any public company can be sued

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[7] Petitioners have previously been dismissed on personal jurisdiction grounds from similar actions brought by plaintiffs in the state courts of California and Illinois, as well as from a federal court action in Florida.

[8] Plaintiff alleges that some of the fraud involved how Qwest accounted for business transactions between Qwest and a handful of New Jersey companies. Not only is this insignificant for personal jurisdiction purposes, but the involvement of these defendants in those transactions was glancing at best. (App. 6, 8-9.) Furthermore, there is an apples-and-oranges aspect to these allegations: this is not a case brought by those companies. The Division was not a party to those transactions, and those transactions were not even separately broken out in the financial reports on which the Division bases its fraud claims. If we are to look at the relationship among the defendant, the forum, and the litigation, *Shaffer*, 433 U.S. at 204, then this inquiry is misplaced in *this* litigation.

in New Jersey if any investor resides there. This unlimited exercise of power is dangerous both from the individual and the interstate perspective, and should be reversed.

2. The Opinion Below Is Premised On The Theory That "Foreseeability Is Enough," A Question This Court Addressed But Did Not Resolve In *Asahi*.

The Appellate Division justified its ruling by holding that it was foreseeable to Woodruff and Szeliga, as the chief financial officers of Qwest, that investors would rely on the statements they made in press releases or the financial statements they signed, even if they were not personally involved in disseminating such information to investors.

> The dissemination to [the Division], an institutional investor of public funds, was accomplished through a division of Qwest established for the very purpose of addressing questions and concerns of investors. There is a basis for an inference that Anschutz, Woodruff and Szeliga were aware of this system for dissemination and expected it to have an impact on the recipient-investors who were the targets, wherever they might be located.

(App. 14-15.) Because they were aware that this information would be disseminated to investors, they can be held to answer wherever any investor who received it resides.

Although the Appellate Division never uses the words "foreseeable" or "foreseeability," these are the concepts that undergird its reasoning: you were an officer or director, you signed these documents, it was foreseeable that they would be disseminated to investors "wherever they might be located," it was equally foreseeable that the same

investors would be injured by the fraud, and therefore it was reasonably foreseeable that you would be sued "wherever [investors] might be located." Since there are no direct, personal actions by Woodruff or Szeliga to point to, the Appellate Division emphasizes the foreseeability of potential (but undifferentiated) harm.

This question of whether foreseeability alone is sufficient as a jurisdictional hook is one that previously has splintered this Court and that has not yet been fully resolved. The debate over foreseeability has largely played out in the field of product liability litigation but, as this case demonstrates, it can have important implications in areas such as securities litigation as well.

In *World-Wide Volkswagen*, the Court expressly rejected the suggestion that foreseeability that an injury could fortuitously occur in a state is sufficient to allow that state to assert jurisdiction over a defendant. In that case, the plaintiffs were injured in an automobile accident in Oklahoma while driving through the state in an Audi automobile they had purchased in New York. They brought suit in Oklahoma against various parties including the regional distributor and the local dealer from New York, alleging that the vehicle was defectively designed. The question before the Court was whether Oklahoma could exercise personal jurisdiction over those two defendants.

Plaintiffs argued that, because an automobile is by its nature mobile, it was reasonably foreseeable that it would cause an injury in Oklahoma, and that this was sufficient to permit Oklahoma to exercise jurisdiction. The Court squarely rejected this argument: "[F]oreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." 444 U.S. at 295.

> If foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there, *see Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (CA4 1956); a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey, *Reilly v. Phil Tolkan Pontiac, Inc.*, 372 F. Supp. 1205 (N.J. 1974); or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there, *see Uppgren v. Executive Aviation Services, Inc.*, 304 F. Supp. 165, 170-171 (Minn. 1969). Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.

Id. at 296. The argument rejected in *World-Wide Volkswagen* is almost identical to the holding here. Qwest's financial reports (rather than Qwest's chattels) have effectively become the agent for service of process of these Qwest employees, and their amenability to suit travels with the emails that deliver such information to investors throughout the world. In the context of intangible things like publicly-filed information and comments in conference calls open to the public, the sweep of this theory is more broad than it was in *World-Wide Volkswagen*, and leaves defendants less able to structure their affairs to provide reasonable expectations about the exposure that they face from their conduct or statements. If foreseeability was an insufficient benchmark in *World-Wide Volkswagen*, in this context it should be even less sufficient.

Seven years after *World-Wide Volkswagen*, the Court splintered in considering another foreseeability/product liability case that is particularly analogous to this one.

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987). *Asahi* raised a sharper question than *World-Wide Volkswagen* because some not-insignificant percentage of defendant Asahi's tire valve assemblies regularly ended up in use in California, and Asahi was assumed to know this. The "foreseeability" of *World-Wide Volkswagen* – which involved a single product that was literally passing through the jurisdiction – was more abstract ("this is a car; cars travel, foreseeably even to Oklahoma"), whereas the "foreseeability" that the Court grappled with in *Asahi* was more direct, with the manufacturer knowing that its products not only *could*, but regularly *did*, end up in the forum State. While Asahi was aware that its valve assemblies regularly ended up in California, Asahi did not purposefully direct any actions towards California or have any other contacts with California. The question therefore was whether this awareness was enough to support an exercise of jurisdiction over Asahi by California's courts.

While the Court unanimously held that California could not assert personal jurisdiction over Asahi because, on the particular facts in question, it would offend traditional notions of fair play and substantial justice to do so, 480 U.S. at 113-16, it split 4-4-1 in addressing whether "the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes 'minimum contacts' between the defendant and the forum State." 480 U.S. at 105. This is precisely the question that this case raises within the securities context.

Justice O'Connor's opinion, joined by Chief Justice Rehnquist and Justices Powell and Scalia, took the position that mere awareness, absent additional purposeful action by the defendant aimed at the forum State, was an insufficient basis for the forum State to exercise jurisdiction:

> The substantial connection between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. . . . [A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

480 U.S. at 112 (plurality opinion of O'Connor, J.) (emphasis in original) (internal quotations and citations omitted). In contrast, Justice Brennan's opinion, joined by Justices White, Marshall and Blackmun, held that, where there is awareness by the manufacturer that its products are regularly being used in the forum State, it would be reasonable to require the manufacturer to defend an action there, even absent any separate action directed towards the forum. These Justices saw "no need" for a showing of additional conduct directed towards the forum:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the

> possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit.

480 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment). Justice Stevens wrote separately, questioning the strict dichotomy that had been posited and finding it unnecessary to resolve the question on the facts presented. 480 U.S. at 121-22 (Stevens, J., concurring in part and concurring in the judgment).

Since *Asahi*, the Court has not returned to the question of whether "foreseeability is enough." While factually distinct from the product cases in which this question first surfaced, this case raises the same question. It is uncontested that neither petitioner interacted directly with plaintiff or specifically targeted plaintiff – there was none of the "additional conduct" that the plurality opinion required and that Justice Brennan's opinion found unnecessary. The exercise of jurisdiction here rested on the conclusion that "foreseeability is enough."

While there was no evidence that either of the petitioners knew the Division was an investor, and they both denied in their sworn affidavits that they had ever had any contact of any kind with plaintiff (App. 48, 51), the Appellate Division nevertheless inferred such awareness. (App. 14-15.) The Appellate Division held that Mr. Woodruff and Mrs. Szeliga "were specifically aware that [the Division] was a major investor and would suffer particular harm." (App. 15.)

> The investor relations division maintained lists of large investors. [The Division] appeared on that list; at one relevant point [The Division] was ranked among the top thirty-five institutional

> investors. A copy of that list was sent to Szeliga, and Woodruff acknowledged that he had access to information about top investors if he needed it. [The Division] received in New Jersey email notices and releases [from the investor relations department], including information filed with the SEC.

(App. 15.) The Appellate Division's ruling rests on the conclusion that Mr. Woodruff and Mrs. Szeliga knew that the Division was a significant investor in Qwest, and the case is closely analogous to the situation of *Asahi*: harm within a State based on a "product" (in this case, allegedly false information contained in Qwest's regulatory filings or press releases rather than a physical widget) from outside the State that ends up in the State, among other places.[9] Neither petitioners nor the actual disseminator (Qwest) specifically targeted New Jersey or singled out one State or investor over others, although we can assume that they knew that the information likely would end up in the State.

On these facts, is it reasonably foreseeable that petitioners, former Qwest employees, will be sued in New

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[9] There is the same type of indirect connection between the plaintiff and the defendant in each case. In *Asahi*, Asahi sold its valve assemblies to a Taiwanese manufacturer, which incorporated it into its own product that the plaintiff ultimately bought. Here, Woodruff and Szeliga made statements or signed documents that Qwest then distributed, and plaintiff obtained. In both cases, there is an intermediary between the plaintiff and the defendants. In both cases, there is no evidence that the defendants expressly aimed any conduct towards the forum or the particular plaintiff. Yet in both cases, the state courts adopted a "foreseeability is enough" basis to assert jurisdiction over the defendants.

Jersey, and is it reasonable to require them to defend a lawsuit there?

The approach of the Appellate Division – awareness that the "product" will end up in the forum without specific targeting of the forum is sufficient to support jurisdiction – cannot be squared with the Due Process principles underlying the law of personal jurisdiction. Here, Colorado residents who are officers of a Colorado-based company are being sued in New Jersey for statements that had nothing to do with New Jersey. They made statements that Qwest incorporated into its press releases, signed regulatory filings that Qwest filed in Washington, D.C., and one of them (Mrs. Szeliga) participated in one conference call open to analysts and the investing public. Was it "foreseeable" that there were investors in Qwest from New Jersey and that some injury could arise in New Jersey from allegedly false statements? Yes. Were petitioners aware that there were investors, including plaintiff, in New Jersey? According to the Appellate Division, yes. Did the petitioners take any "action . . . purposefully directed toward the forum State," 480 U.S. at 112? No. Could they reasonably expect to be haled into court in New Jersey simply because they knew that the State of New Jersey was a significant investor in their employer? The Court failed to answer this fundamental question in *Asahi*, but the answer should be "no."

As with product liability litigation, securities fraud litigation presents this question – concerning widespread effects arising from conduct or actions that are not targeted at a particular forum – on a recurring basis. If the opinion of the Appellate Division is correct, with this plaintiff having been number thirty-five on the list of institutional shareholders, then certainly the preceding

thirty-four institutional shareholders, as well as an unknown number of smaller investors, can make the same argument, and there is no delimiting rule to identify any constitutional cut-off point. Petitioners urge the Court to grant this petition and revisit the questions raised in *Asahi* and to reject the holding that "foreseeability is enough." More should be required before a forum State can exercise jurisdiction over non-resident defendants than these facts offer.

B. The Appellate Division Improperly Asserted Jurisdiction On The Basis Of Allegations Of Conspiracy.

Perhaps sensing the weakness of its justification for permitting New Jersey to exercise jurisdiction over these petitioners, the Appellate Division invoked an equally problematic reason as its backstop, finding that petitioners could be held to answer in New Jersey because plaintiff had alleged that they were part of a conspiracy.

> With respect to defendants' individual protestations of ignorance about transmissions to [the Division], other courts have recognized that a "'conspiracy theory' of personal jurisdiction is based on the 'time honored notion that the acts of [a] conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy.'" *Textor v. Bd. of Regents*, 711 F.2d 1387, 1392-93 (7th Cir. 1983).

(App. 16.) "The exercise of long-arm jurisdiction based on conspiracy rests on the concept that acts of conspirators in furtherance of the conspiracy are attributable to co-conspirators." *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995). Here, the Appellate Division

found that "[i]n addition to the dissemination of the fraudulent reports in this State, [the Division] alleges other overt acts in New Jersey in furtherance of the conspiracy that are directly related to and facilitated the production of the fraudulent statements. . . . These transactions, which were allegedly misrepresented in financial reports, were actions in this jurisdiction in furtherance of the conspiracy to defraud investors." (App. 17-18.) While the Appellate Division's opinion does not spend much time in developing this reasoning, it is apparent that it held that contacts with New Jersey other than the petitioners' personal contacts could be attributed to petitioners to support an exercise of jurisdiction over them.

This Court has never addressed the question of whether the conduct of some alleged participants in a conspiracy can be attributed to others for personal jurisdiction purposes. This Court previously has articulated what appears to be a contrary rule, *i.e.*, that each defendant's contacts must be assessed individually in considering personal jurisdiction. In *Calder v. Jones*, the Court stated that "[p]etitioners are correct that their contacts with California are not to be judged according to their employer's activities there. . . . Each defendant's contacts with the forum State must be assessed individually." 465 U.S. at 790; *accord Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984). This Court's entire modern jurisprudence regarding personal jurisdiction has been directed towards considering the relationship between the defendant *individually*, the litigation, and the forum. There has never been a "transitive property of jurisdiction."

As a matter of substantive law, conspiracy is a way of attributing vicarious liability to one person based on the

acts of another. *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1493 (D.C. Cir. 1989); *Hall v. Clinton*, 285 F.3d 74, 82 (D.C. Cir. 2002). It is not clear whether this vicarious liability applies equally to the question of whether a State can exercise jurisdiction over a defendant, thereby creating an exception to the rule laid down in *Calder*. Federal and state courts have split on this question, with some courts holding either that state law does not authorize it or that it would violate Due Process principles to permit one person's contacts to support an assertion of jurisdiction over another, while another group has rejected this argument and permitted an assertion of jurisdiction on the basis of conspiracy. *Compare Mackey v. Compass Marketing, Inc.*, 391 Md. 117, 127 n.3, 892 A.2d 479, 485 n.3 (2006) (holding Maryland permits conspiracy as a basis for jurisdiction; collecting cases); *Santa Fe Technologies, Inc. v. Argus Networks, Inc.*, 131 N.M. 772, 42 P.3d 1221 (N.M. Ct. App. 2001) (same; New Mexico); *Ex parte United Ins. Cos.*, 936 So.2d 1049 (Ala. 2006) (same; Alabama) *with Mansour v. Superior Court*, 38 Cal. App. 4th 1750, 46 Cal. Rptr. 2d 191 (1996) (holding California does not permit conspiracy as a basis for jurisdiction and that it would violate Due Process); *Gibson*, 897 S.W.2d at 773 (same; Texas); *Hewitt v. Hewitt*, 78 Wash. App. 447, 896 P.2d 1312, 1316 (1995) (same; Washington). Certiorari should be granted to address this split of authority.

Even assuming that the vicarious liability of conspiracy law can support a vicarious exercise of jurisdiction, it is not clear what a plaintiff must show in order for a court to exercise jurisdiction in such circumstances. *Cf. Second Amendment Foundation v. United States Conf. of Mayors*, 274 F.3d 521 (D.C. Cir. 2001) (requiring plaintiff alleging jurisdiction on basis of conspiracy to make *prima facie*

showing of conspiracy); *Mansour v. Superior Court*, 38 Cal. App. 4th 1750, 46 Cal. Rptr. 2d 191 (1996) (finding plaintiff failed to meet standard of proof to show personal jurisdiction based on conspiracy). The strong dictate in *Keeton* and *Calder* is in tension with the relative looseness that is often applied to conspiracy allegations; indeed, conspiracy allegations are routinely pleaded and subject to relaxed standards at the pleading stage. If conspiracy allegations can create the basis for an exercise of jurisdiction, it threatens to undo the rules that have been established by this Court from *International Shoe* forward regarding the criteria and considerations that play into determining whether a forum State can exercise personal jurisdiction over a particular defendant. It would be a very big loophole in a rule that has so far had none.

This case illustrates the problem clearly. The Appellate Division spent little time assessing this question, but held that, because petitioners had been alleged to be part of a conspiracy, and because overt acts allegedly had occurred in New Jersey, it was sufficient to hale petitioners into court there. But this casual approach stands in stark contrast to the usual process of evaluating personal jurisdiction, which considers whether the plaintiff can introduce evidence to support a *prima facie* case (at the least) that the contacts between the plaintiff and the forum support jurisdiction. Conspiracy offers an alarming end-run around the rules as they stand.

The state and federal courts are in disarray regarding whether acts of a conspirator can be attributed to a co-conspirator; furthermore, the standards for evaluating such claims on a jurisdictional motion to dismiss are varied, with this case reflecting a lax approach under which allegations suffice in lieu of evidence, whereas other courts apply

stringent standards to evaluate whether a plaintiff has met its evidentiary burden on such a motion. Petitioners urge the Court to grant this petition in order to provide guidance to the courts, both state and federal, regarding whether conspiracy allegations can be applied in the context of personal jurisdiction analysis and, if so, what standards should be applied to be certain that this theory of vicarious liability does not sweep away the Due Process concerns and protections that underlie this area of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANDREW T. BERRY
JOSEPH T. BOCCASSINI
JAMES C. SHEIL
McCARTER & ENGLISH, LLP
Four Gateway Center,
100 Mulberry Street
Newark, New Jersey
07102-4096
(973) 622-4444

Counsel for Petitioners Szeliga and Woodruff

DAVID LAWRENCE COOK, ESQ.
CLIFFORD CHANCE US LLP
31 W. 52nd Street
New York, New York
10019-6131
(212) 878-8000

Counsel for Robert Woodruff

VINCENT J. MARELLA
Counsel of Record
MARK T. DROOKS
THOMAS V. REICHERT
BIRD, MARELLA, BOXER, WOLPERT, NESSIM, DROOKS & LINCENBERG, P.C.
1875 Century Park East,
23rd Floor
Los Angeles, California
90067-2561
(310) 201-2100

Counsel for Robin Szeliga

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2505-04T1
A-2511-04T1

STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF INVESTMENT, by TREASURER JOHN E. McCORMAC,

Plaintiff-Respondent,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC., JOSEPH P. NACCHIO, STEPHEN M. JACOBSEN, DRAKE S. TEMPEST, MARC B. WEISBERG, JAMES A. SMITH, AFSHIN MOHEBBI, LEWIS O. WILKS, CRAIG D. SLATER and ARTHUR ANDERSON, LLP

Defendants,

and

ROBERT S. WOODRUFF and ROBIN R. SZELIGA,

Defendants-Appellants.

APPROVED FOR PUBLICATION

August 18, 2006

APPELLATE DIVISION

STATE OF NEW JERSEY,
DEPARTMENT OF TREASURY,
DIVISION OF INVESTMENT, by
TREASURER JOHN E. McCORMAC,

Plaintiff-Respondent,

v.

QWEST COMMUNICATIONS
INTERNATIONAL, INC.,
JOSEPH P. NACCHIO, STEPHEN
M. JACOBSEN, DRAKE S.
TEMPEST, MARC B. WEISBERG,
JAMES A. SMITH, AFSHIN
MOHEBBI, LEWIS O. WILKS,
CRAIG D. SLATER AND
ARTHUR ANDERSEN, LLP

Defendants,

and

PHILIP F. ANSCHUTZ,

Defendant-Appellant.

Argued November 16, 2005 – Decided August 18, 2006

Before Judges Stern, Grall and Lihotz.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, L-3738-02.

David Cook argued the cause for appellant Robert S. Woodruff (McCarter & English; Mr. Cook, Wesley R. Powell (Clifford Chance US), of the New York bar, admitted pro hac vice, attorneys; Mr. Powell, of counsel; Joseph T. Boccassini, on the brief).

Thomas V. Reichert (Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg), of the California bar, admitted pro hac vice, argued the cause for appellant Robin R. Szeliga (McCarter & English; Mr. Reichert, Mark T. Drooks (Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg), of the California bar, admitted pro hac vice, attorneys; Mr. Reichert and Mr. Drooks, of counsel; Joseph T. Boccassini, on the brief).

Michael J. Hoffman (Holme Roberts & Owen), of the Colorado bar, admitted pro hac vice, argued the cause for appellant Philip F. Anschutz (McCarter & English; Mr. Hoffman, Bruce F. Black (Holme Roberts & Owen), of the Colorado bar, admitted pro hac vice, and Neil M. Gorsuch (Kellogg, Huber, Hansen, Todd & Evans), of the District of Columbia bar, admitted pro hac vice, attorneys; Mr. Hoffman, Mr. Black and Mr. Gorsuch, of counsel; Joseph T. Boccassini, on the brief).

Todd S. Collins (Berger & Montague) of the Pennsylvania bar, admitted pro hac vice, argued the cause for respondent (Sterns & Weinroth and Mr. Collins, Merrill Davidoff and Ellen T. Noteware (Berger & Montague), of the Pennsylvania bar, admitted pro hac vice, attorneys; William J. Bigham, Nancy Axelrod, Mr. Davidoff and Ms. Noteware, of counsel; Mr. Bigham, on the brief).

The opinion of the court was delivered by

GRALL, J.A.D.

This appeal arises from an action commenced by the State of New Jersey, Department of Treasury, Division of Investment (NJT) to recover damages allegedly sustained as a consequence of a civil conspiracy to induce investments in stock issued by Qwest Communications International,

Inc. (Qwest) through a series of fraudulent misrepresentations. We granted three individual, non-resident defendants, Philip E. Anschutz, Robert S. Woodruff and Robin R. Szeliga (collectively defendants), leave to appeal from an order denying their motions to dismiss for want of personal jurisdiction.[1]

While defendants are not New Jersey residents and do not have continuous and systematic contacts with this State sufficient to permit an exercise of general jurisdiction, we conclude that NJT has established a "relationship among [each] defendant, the forum, and the litigation" that is sufficient to permit exercise of personal jurisdiction. *Lebel v. Everglades Marina, Inc.,* 115 *N.J.* 317, 323, 327 (1989) (quoting *Shaffer v. Heitner,* 433 *U.S.* 186, 204, 97 *S. Ct.* 2569, 2579, 53 *L. Ed.* 2d 683, 698 (1977)). The exercise of specific jurisdiction is based on defendants' "intentional act[s] calculated to create an actionable event in [this State]," – *i.e.,* the intentional dissemination of false information "expected or intended to cause injury in New Jersey." *Blakey v. Continental Airlines, Inc.,* 164 *N.J.* 38, 67 (2000).

The following facts relevant to specific jurisdiction are drawn from the pleadings and the evidential materials submitted on the motion to dismiss. *See Blakey, supra,* 164 *N.J.* at 71-73, 751 *A.*2d 538; *Lebel, supra,* 115 *N.J.* at 324. The judge took no testimony, and there are no findings based on credibility to which we owe deference. *See Rova*

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[1] By order dated January 26, 2005, we consolidated the appeal filed by Szeliga and Woodruff (A-2505-04) with the appeal filed by Anschutz (A-2511-04) and with an appeal filed by NJT from a separate interlocutory order granting a motion to dismiss filed by defendant Arthur Andersen, LLP (A-2503-04). We now de-consolidate NJT's appeal (A-2503-04), which we address in a separate decision. *State of New Jersey v. Qwest Comm. Int'l, Inc.,* ___ *N.J. Super.* ___ (App. Div. 2006).

Farms Resort, Inc. v. Investors Ins. Co., 65 *N.J.* 474, 484 (1974). As defendants acknowledge, our review is de novo.

NJT alleged that between April 1, 1999 and December 3, 2001, it purchased seven million shares of common stock issued by Qwest at prices that were artificially inflated through a civil conspiracy to defraud investors by misrepresenting earnings and assets in public statements, press releases, SEC filings and conference calls with investors in which a representative of NJT participated. Qwest has since restated earnings for the relevant years and announced its intention to provide additional re-statements.

NJT's complaint details the dates and contents of misleading statements and correlates those dates with the dates of large purchases of Qwest stock made by NJT. The complaint also recites transactions involving shares of stock in Qwest from which the individual defendants turned a profit and diminished the potential for loss of their personal wealth, through public sale or, in Anschutz's case, hedging transactions and a sale of the Anschutz Company's stock in Qwest to Bell South.

None of the individual defendants disputed signing the documents or making statements attributed to them in releases and filings. Nor do they dispute NJT's history of stock purchases or their individual acquisitions or sales of Qwest stock.

Anschutz became involved in Qwest before its stock was publicly traded. He owned 100% of the stock in the Anschutz Company. The Anschutz Company owned SP Telecom. SP purchased Qwest, and adopted its name. After that purchase, the Anschutz Company owned 100% of

Qwest. Anschutz was a chairman of Qwest and a member of its executive committee at all relevant times.[2]

In fall 1996, when Qwest was considering a public offering of its stock, Anschutz met with Joseph P. Nacchio at Teterboro Airport in New Jersey. They discussed Nacchio's joining Qwest as its CEO. An agreement was reached under which Qwest opened offices in New Jersey and Nacchio worked from New Jersey, subject to the condition that he could be required to work in Colorado up to four days per week. Nacchio spent significant time in Colorado but also worked in New Jersey. Nacchio was in regular contact with Anschutz, whom he consulted on every major decision confronting him as CEO of Qwest. During Nacchio's tenure, Qwest traded its stock publicly. After the initial public offering, the Anschutz Company owned about 85% of the shares.

Woodruff was Qwest's CFO and Vice President of Finance when Nacchio took over as Qwest's CEO, and he stayed with Qwest until March 2001. Woodruff reported to Nacchio. He was responsible for treasury and finance. In addition, after Qwest went public, it added internal audit and investor relations divisions, both of which reported to the CFO. Woodruff had responsibility for SEC filings, which he signed after they were prepared by staff under his supervision. He involved outside auditors as he deemed appropriate. The investor relations division communicated with shareholders and the investment community; press releases and SEC filings were sent to

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[2] The record is less than clear on the proper title of Anschutz's businesses – Anschutz Corporation or Anschutz Company and SP Construction or SP Telecom – but there is no dispute about the ownership or relevant transaction.

investors who requested information. Woodruff reviewed releases about earnings that were disseminated to the press and investors. A representative of NJT received that information in New Jersey. Information about holders of significant blocks of Qwest stock was available to him, "if [he] needed it." He denied knowing that NJT was a significant holder of Qwest stock.

In 1999 Qwest took steps in preparation for a merger with U.S. West and completed that merger in June 2000. A release sent to NJT and other investors by Qwest quoted Nacchio's expression of pleasure with Qwest's progress and Woodruff's characterization of the report as reflective of Qwest's "continued momentum" and "strong revenue growth." The release was sent to NJT in New Jersey in June 1999. In early July 1999, NJT acquired 150,000 shares of Qwest stock for $5.13 million. Qwest issued additional positive statements quoting Anschutz and Woodruff, and Woodruff signed additional filings in July and August of 1999. During those months, NJT purchased an additional 97,000 shares at a cost of $2.14 million. On October 27, 1999, Qwest announced record high quarterly revenues, in excess of one billion dollars in the most recent quarter. Releases and filings reporting dramatic increases continued through June 30, 2000, when U.S. West merged into and became part of Qwest. On July 3, 2000, NJT acquired 3,122,746 shares of Qwest stock for $161.6 million. On July 21, 2000, Nacchio sold 100,000 shares of his stock in Qwest.

Positive reports about Qwest's prospects were repeated in filings and releases after the merger. In December 2000 Qwest issued a press release to assure investors that it was not experiencing the difficulties its competitors were encountering and would meet expectations. In

February 2001, Nacchio announced his confidence in Qwest's ability to meet its announced revenue goals. By that time NJT had purchased additional stock in Qwest well in excess of one million shares.

Qwest's earnings were overstated. This was accomplished through a scheme involving the sale and repurchase of capacity on its network ("IRUs" or "indefeasible rights of use") and the false reporting of those "swap" transactions. Expenses for equipment were also falsely stated. For example, as a consequence of a series of transactions with KMC Telecom Holdings (KMC), Qwest purchased equipment and sold that equipment to KMC. Qwest reported the sales as revenue; KMC financed the equipment and reported the debt. Qwest then paid KMC for use of the equipment. KMC is based in New Jersey. Woodruff acknowledged that he approved the restructuring of accounting concerning KMC receivables, but denied approving the original structuring. Earnings statements throughout the relevant period were based on similar reporting of similar transactions.

NJT alleges that Qwest's dealings with Tellium, which is another New Jersey based business, included an illegal "swap" transaction. Anschutz approved another agreement through which Qwest officers and employees obtained shares of stock in Tellium. NJT claims that there is a connection between these transactions.

Woodruff traveled to New Jersey less than a handful of times on business. He attended one meeting at Nacchio's New Jersey office at which the management team put together a budget for the upcoming year and another meeting that was held to prepare for the "earnings release

process." Nacchio attended both meetings. Anschutz did not attend.

Woodruff also went to New Jersey on behalf of KPN Qwest, a joint venture between Qwest and a Dutch telephone company. KPN Qwest was issuing high-yield debt, and the purpose of Woodruff's trip was to attract investors.

Woodruff left Qwest in March 2001, and Szeliga took over as acting CFO. She was named CFO on April 18, 2001. Prior to assuming Woodruff's responsibilities, Szeliga's duties included providing information to the investor relations group that reported to Woodruff. Szeliga saw "technical accounting opinions from [their] controllers group and from [their] auditors on how to account for [the KMC sales] and concurred with their reasoning and suggestions for the accounting for KMC." The investor relations division continued to provide releases, and notice of filings and investor-conference calls to NJT in New Jersey during Szeliga's tenure. Although purchases and sales of large blocks of stock by institutional investors were mentioned to her, Szeliga did not recall any mention of NJT. Like her predecessor, she signed SEC filings and approved releases that were transmitted to NJT.

On June 20, 2001, Morgan Stanley issued a report identifying suspected accounting irregularities in Qwest's financial statements. On the same day, Nacchio and Szeliga defended Qwest's reports and accounting methods on a conference call with investors. A representative of NJT participated in that call from New Jersey. Notice of that call was given to him by email received in New Jersey. On the same day Qwest also issued a press release confirming that it expected to meet its projections. On

June 21, 2001, Szeliga reiterated Qwest's position in a statement filed with the SEC.

On July 25, 2001, Morgan Stanley issued a second report questioning Qwest's "swap" transactions. On August 21, 2001, Wolfe, head of the investor relations division, wrote to Nacchio and Szeliga and enclosed a list of institutional shareholders in descending order. The cover memo explained the pattern of investors' sales of Qwest stock between August 1 and 7, 2001. Wolfe noted that there were exceptions to the general patterns "depending on what they [the investors] believe about Qwest's story." On October 30, 2001, Qwest filed a registration statement with the SEC that incorporated earlier filings. It was signed by Nacchio, Szeliga and Anschutz.

On December 13, 2001, Qwest issued a release denying rumors about its improper recognition of the KMC transactions. That release quoted Szeliga. In late 2001 and early 2002, the Anschutz Company divested itself of a significant number of its shares in Qwest through hedging transactions and a sale to Bell South.

The foregoing evidence and reasonable inferences therefrom permit exercise of jurisdiction. New Jersey's long-arm rule permits courts to exercise personal jurisdiction to the fullest extent allowed under the United States Constitution. *See R.* 4:4-4(b)(1); *Avdel Corp. v. Mecure,* 58 *N.J.* 264, 268 (1971). While the basis for exercise of personal jurisdiction may be either general or specific, *Waste Mgmt., Inc. v. Admiral Ins. Co.,* 138 *N.J.* 106, 119 (1994), *cert. denied sub nom., WMX Tech., Inc. v. Canadian Gen. Ins. Co.,* 513 *U.S.* 1183, 115 *S. Ct.* 1175, 130 *L. Ed.* 2d 1128 (1995), there is no question that this case requires a basis for exercise of specific jurisdiction over the individual

defendants, which is dependent upon the relationship of each with this State and this litigation. *Lebel, supra,* 115 *N.J.* at 323; *see Waste Mgmt., supra,* 138 *N.J.* at 127. Our courts "evaluate the minimum contacts of a defendant [essential for specific jurisdiction] on a case-by-case basis." *Blakey, supra,* 164 *N.J.* at 66 (quoting *Waste Mgmt., supra,* 138 *N.J.* at 122). When the plaintiff establishes sufficient minimum contacts, which is the first prong of a two-prong test, the burden shifts to the defendant to show that exercise of jurisdiction would offend "traditional notions of fair play and substantial justice," *Lebel, supra,* 115 *N.J.* at 327-29, which is the second prong of the test. Defendants' argument on appeal is limited to the first prong of this test for specific jurisdiction.

Fraudulent communications are at the center of this controversy. NJT's claims are based on its assertion that it was injured as a consequence of intentionally false statements about the financial health of Qwest that were disseminated in this State and upon which NJT relied in investing public funds. The case is not about advertising a product that subsequently causes an injury that is unrelated to the communication. The crux of the cause of action is the dissemination of fraudulent statements into this State that caused harm to NJT here.

The New Jersey Supreme Court has addressed specific jurisdiction in cases centered on intentional torts based on wrongful communications on two occasions, and in both instances the Court has made it clear that an intentional communication of information with knowledge or purpose that it will cause harm in this State suffices to establish the requisite minimum contacts. *Blakey, supra,* 164 *N.J.* at 69 (discussing defamation); *Lebel, supra,* 115 *N.J.* at 326-27 (discussing fraudulent statements).

In *Lebel,* the Court reasoned: "Where a defendant knowingly sends into a state a false statement, intending that it should then be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state." *Id.* at 326 (quoting *Vishay Intertechnology, Inc. v. Delta Int'l Corp.,* 696 *F.*2d 1062, 1066 (4th Cir. 1982)). The Court held that New Jersey had specific jurisdiction in a case involving fraud in the sale of a boat to a New Jersey resident by a Florida company. *Id.* at 320-21, 324-26. With respect to communications, the Court made it clear that it is not the fact or frequency of the communication but its relationship to the cause of action that is relevant. *Id.* at 325-26 (noting that the "nature of the contact" rather than the transmittal of the message was critical and stressing "that in this case it is alleged that the defendant's representations via mail and telephone to New Jersey were fraudulent"). As in *Lebel,* the fact that this litigation is centered upon fraudulent communications is critical in the analysis of the significance of the dissemination of the information to NJT in this State.

Similarly, in *Blakey* the Court held that the question of specific jurisdiction over individual defendants alleged to have made defamatory and retaliatory statements was whether that harassment was expected or intended to cause injury in New Jersey. 164 *N.J.* at 68. In this case, as in *Blakey,* the gravamen of the conduct alleged is the communication disseminated to NJT in this State. The Court further explained that where actionable harm is caused in this State, "'[t]he fact that the actions causing the effects in [New Jersey] were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising from those effects.'" 164 *N.J.* at 67-68 (quoting *Calder v. Jones,* 465 *U.S.* 783, 787, 104

S. Ct. 1482, 1485, 79 *L. Ed.* 2d 804, 810 (1984)). The Court concluded that where actionable communications are at issue, the question is "whether the [communication] was expected or intended to cause injury in New Jersey" – *i.e.*, whether the statements were issued "with knowledge or purpose of causing harm to plaintiff [in this State]." *Id.* at 67.

Neither *Lebel* nor *Blakey* establish a new rule of law governing specific jurisdiction in cases involving tortious communications. Both cases rely upon decisions of the United States Supreme Court involving actions for libel. *Blakey, supra,* 164 *N.J.* at 67; *Lebel, supra,* 115 *N.J.* at 323. In *Keeton v. Hustler Magazine, Inc.,* 465 *U.S.* 770, 775, 104 *S. Ct.* 1473, 1478, 79 *L. Ed.* 2d 790, 798 (1984), the Court held that regular circulation of a magazine in the forum state was sufficient to establish personal jurisdiction in a libel case. In *Calder, supra,* 465 *U.S.* at 789, 104 *S. Ct.* at 1486, 79 *L. Ed.* 2d at 811-12, the Court held alleged intentional, libelous conduct in Florida "expressly aimed at California" was sufficient to permit California's exercise of jurisdiction. In *Waste Mgmt., supra,* 138 *N.J.* at 126, the New Jersey Supreme Court explained the rule established in *Calder:* "An intentional act calculated to create an actionable event in a forum state will give that state jurisdiction over the actor." We read *Blakey* and *Lebel* to hold that action with the knowledge or intention of causing harm within this State satisfies the role of the "'purposeful availment' requirement [of minimum contacts jurisprudence, because it] ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Blakey, supra,* 164 *N.J.* at 67 (quoting *Burger King Corp. v. Rudzewicz,* 471 *U.S.* 462, 475, 105 *S. Ct.* 2174, 2183, 85 *L. Ed.* 2d 528,

542 (1985)); *see also IMO Indus., Inc. v. Kiekert AG,* 155 *F.*3d 254, 260 (3d Cir. 1998) (noting that an intentional tort "may suffice to enhance otherwise insufficient contacts with the forum").

Defendants correctly note that the actions and knowledge of each of them must be considered individually not in the aggregate. *Waste Mgmt., supra,* 138 *N.J.* at 127. Woodruff, Szeliga and Anschutz all signed filings with the SEC that included allegedly false statements that induced NJT to purchase and hold Qwest stock. NJT received in New Jersey specific notice of those filings and accompanying press releases from Qwest's investor relations division that included statements from all three defendants. The approval of such statements and the system for their dissemination by the investor relations division is sufficient to give rise to an inference that each of these defendants recognized that investors would rely upon them. *See Derensis v. Coopers & Lybrand Chartered Accountants,* 930 *F. Supp.* 1003, 1014 (D.N.J. 1996) (discussing jurisdiction in New Jersey over officers of a Canadian company and apparently relying on status as a "controlling person" under 15 *U.S.C.A.* § 78t(a)); *cf. City of Monroe Employees Ret. Sys. v. Bridgestone Corp.,* 399 *F.*3d 651 (6th Cir.) (dismissing claim against foreign national on grounds of reasonableness under the circumstances and declining to exercise jurisdiction based on status of "controlling person" under those circumstances), *cert. denied,* ___ *U.S.* ___, 126 *S. Ct.* 423, 163 *L. Ed.* 2d 322 (2005). The dissemination to NJT, an institutional investor of public funds, was accomplished through a division of Qwest established for the very purpose of addressing questions and concerns of investors. There is a basis for an inference that Anschutz,

Woodruff and Szeliga were aware of this system for dissemination and expected it to have an impact on the recipient-investors who were the targets, wherever they might be located.

With respect to Woodruff and Szeliga, there are additional bases for concluding that they were specifically aware that NJT was a major investor and would suffer particular harm. They oversaw the functions of the division of investor relations as well as the preparation of the financial information included in the various statements and releases. The investor relations division maintained lists of large investors. NJT appeared on that list; at one relevant point NJT was ranked among the top thirty-five institutional investors. A copy of that list was sent to Szeliga, and Woodruff acknowledged that he had access to information about top investors if he needed it. NJT received in New Jersey email notices and releases, including information filed with the SEC.

The communications with NJT as an investor were not fortuitous or wholly dependent upon NJT's actions, and the communications were the actions that NJT alleges caused harm. Defendants' argument that these communications were dependent upon NJT's action in requesting to receive information sent to investors overlooks the role of the Qwest investor relations division and the relevance of these statements to the harm alleged.

Defendants' reliance upon *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Assoc.*, 142 F.3d 26 (1st Cir. 1998), is misplaced. In that case, plaintiff attempted to base jurisdiction on isolated communications peripheral to the conspiracy alleged, not on a fraudulent communication that was the wrong alleged. This case is more analogous to

Cody v. Ward, 954 *F. Supp.* 43, 45-47 (D.Conn. 1997), in which the court held that oral misrepresentations directed specifically to the forum for the purpose of causing the recipient to purchase shares of stock were sufficient to permit exercise of specific jurisdiction in an action based on the fraud.

Defendants seem to argue that because other investors in other states also received the fraudulent information, the notices directed to NJT cannot be viewed as aimed at an investor in this State. We do not see how that diminishes the significance of the fact that the false statements were directed to NJT, a recipient-investor in this State. The question is whether this State was the focal point of a harm NJT suffered as a consequence of the intentional tort aimed at NJT in this State. *IMO Indus., supra,* 155 *F.*3d at 261, 265-66 (finding no basis for specific jurisdiction in state of plaintiff's principal place of business where tortious conduct was not directed at the plaintiff in that forum). There is no authority for the proposition that jurisdiction grounded on such conduct is defeated because there may be another, similarly situated and targeted victim in a different forum.

With respect to defendants' individual protestations of ignorance about transmissions to NJT, other courts have recognized that a "'conspiracy theory' of personal jurisdiction is based on the 'time honored notion that the acts of [a] conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy.'" *Textor v. Bd. of Regents,* 711 *F.*2d 1387, 1392-93 (7th Cir. 1983) (quoting *Gemini Enter., Inc. v. WFMY Television Corp.,* 470 *F. Supp.* 559, 564 (M.D.N.C. 1979)); *see Miller Yacht Sales, Inc. v. Smith,* 384 *F.*3d 93, 102 n.8 (3d Cir. 2004) (Scirica, J., dissenting) (discussing imputation of jurisdictional

contacts based upon conspiracy theory). In *Matsumoto v. Matsumoto,* 335 *N.J. Super.* 174, 180-85 (App. Div.), *aff'd and modified on other grounds,* 171 *N.J.* 110 (2000), we upheld the trial judge's conclusion that New Jersey had personal jurisdiction over a foreign national who interfered with the custody of a parent in this State. In so doing, we relied, in part, upon *Chiosie v. Chiosie,* 480 *N.Y.S.*2d 756, 757 (N.Y. App. Div. 1984). In that case the court held that tortious acts of co-conspirators in New York were sufficient to establish jurisdiction over a co-conspirator defendant who was a resident of New Jersey. *Ibid.*

In this case, the investor relations division was established under the supervision of Woodruff, Nacchio and, inferentially, Anschutz, and the division was given financial information by and then taken over by Szeliga. Each of the defendants made or signed statements disseminated to NJT through the investor relations division. An inference and imputation of knowledge that the investor relations division would transmit the false statements to investors who requested regular notification is available on these facts.

In addition to the dissemination of the fraudulent reports in this State, NJT alleges other overt acts in New Jersey in furtherance of the conspiracy that are directly related to and facilitated the production of the fraudulent statements. The structuring and reporting of equipment sales to KMC Telecom Holdings, a New Jersey based company, is one of the allegedly misstated transactions. Woodruff came to New Jersey in connection with the joint venture, KPN Qwest. NJT alleges that Qwest overstated the worth of that joint venture. There is also evidence that Anschutz was involved in Qwest's dealings with Tellium,

which NJT alleges included an illegal "swap" transaction that was not properly reported. These transactions, which were allegedly misrepresented in financial reports, were actions in this jurisdiction in furtherance of the conspiracy to defraud investors.

Under all of the circumstances, we cannot conclude that NJT failed to present evidence and reasonable inferences adequate to raise a factual issue on whether each of the individual defendants contributed to the dissemination of false information to NJT with the intention or expectation of causing harm to NJT as a recipient investor. We note that defendants have not presented an argument that addresses NJT's pleadings and proofs with respect to the individual counts of the complaint – *i.e.,* defendants' argument does not distinguish NJT's claims based on intentional fraud and civil conspiracy from claims based on negligence in reporting. For that reason we neither consider the issue nor foreclose reconsideration of jurisdiction on a claim-by-claim basis in the trial court.

As noted above, defendants present no argument on this appeal in connection with the "second prong" of the test for specific jurisdiction – "whether it would offend traditional notions of fair play and substantial justice to entertain the suit." *Lebel, supra,* 115 *N.J.* at 327. In order to obtain a dismissal on that basis, defendants must establish a "compelling case that the presence of some other considerations would render jurisdiction [based on their respective roles in dissemination of false information to NJT in this State] unreasonable." *Id.* at 328 (quoting *Burger King, supra,* 471 *U.S.* at 477, 105 *S. Ct.* at 2184, 85 *L. Ed.* 2d at 544, and identifying factors such as the burden on the defendant, the plaintiff's interest in obtaining relief, the interest of the forum state and the interstate

judicial system's interest in efficient resolution of controversies).

We see no basis for finding offense to traditional notions of substantial justice and fairness by entertaining this action to recoup significant public funds lost as a consequence of reliance on the alleged false statements transmitted to NJT in this State. In this connection, Nacchio's presence in New Jersey as CEO of Qwest cannot be overlooked. Nacchio was at the center of the conspiracy to misstate earnings; NJT's complaint contains numerous relevant statements attributed to him. He had offices in New Jersey from which he worked on a regular, albeit part-time, basis, and he had ongoing contacts with his subordinates Szeliga and Woodruff and his superior Anschutz. Woodruff attended a meeting with Nacchio in New Jersey, the topic of which was the release of earnings information at issue. The significant amount of NJT's investment and loss is also relevant to defendants' expectations about being haled into the courts of this State and the State's interest in providing a forum. *Lebel, supra,* 115 *N.J.* at 330, 558 *A.*2d 1252 (discussing the relevance of the amount in controversy to the second-prong of the test for exercise of personal jurisdiction).

Defendants' argument on this appeal focuses on the trial judge's reliance on the stream of commerce theory of personal jurisdiction adopted by the Supreme Court in *Charles Gendler & Co. v. Telecom Equip., Corp.,* 102 *N.J.* 460 (1986). We do not read the trial judge's decision as fully dependent upon *Gendler,* and, in any event, our determination of the legal questions is de novo, as defendants recognize.

The order is affirmed and the matter is remanded. We do not foreclose reconsideration of the question of personal jurisdiction over the individual defendants as the discovery on the individual claims proceeds. *See Blakey, supra,* 164 *N.J.* at 60, 71-73.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MERCER COUNTY, NEW JERSEY
DOCKET NO. MER-L-3738-02
A.D.#_____

STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF INVESTMENT, Plaintiff, v. QWEST COMMUNICATIONS INTERNATIONAL, INC., et al. Defendants.	TRANSCRIPT OF DECISION Place: Mercer County Civil Courthouse 175 South Broad Street Trenton, NJ 08650 Date: December 3, 2004

BEFORE:

THE HON. PAULETTE M. SAPP-PETERSON, P.J.Cv.P.

TRANSCRIPT ORDERED BY:

IRA J. BRANDENBURG, Litigation Paralegal
(Tompkins, McGuire, Wachenfeld & Barry, LLP)

Transcriber, Mary L. Polito
J&J COURT TRANSCRIBERS, INC.
268 Evergreen Avenue
Hamilton, NJ 08619
(609) 586-2311
FAX NO. (609) 587-3599
E-mail: jjcourt@optonline.net

Audio Recorded

[2] (Audio is poor quality)

THE COURT: State v. Qwest and others. Docket Number L-3738-02. The Court conducted oral argument on these motions in July, I believe, 2004.

Initially, oral argument was conducted in June of 2003 and the Court adjourned the ultimate resolution of these matters and permitted jurisdictional discovery to be conducted.

This matter arises out of an action brought by the plaintiff, the State of New Jersey, against defendant, Qwest Communication (sic) and its executives and directors and its accounting firm, Arthur Andersen.

Plaintiff alleges that Qwest – Andersen, its outside auditing firm, and 11 of its most senior and influential officers and directors conspired to defraud the State by employing a variety of improper accounting and business practices and by issuing false and misleading statements about Qwest operations, revenue and profits for the purposes of fraudulently inflate share prices.

Plaintiff contends the result of Defendant's actions, New Jersey has sustained hundreds of millions of dollars in investment losses. A number of the individually-named defendants, namely Philip Anschutz, Robin Szeliga, Robert Woodruff, Steven Jacobson, Marc Weisberg, Jane Smith, Lewis Wilks, Craig Slater and Afshin Mohebbi now seeking to order wanting dismissing the facts against each of them for lack of personal jurisdiction.

Neither Qwest nor Arthur Andersen contest personal jurisdiction in this matter. Nor does Joseph P. Nacchio, Qwest Chairman and CEO, from April of 1999 to June 17th, 2002 who resided in New Jersey.

While, of course, decision was pending, the Court was notified that the plaintiff has agreed to dismiss without prejudice its claims against Jane Smith, Lewis Wilks, Stephen Jacobsen and Marc Weisberg.

Therefore, this decision will address whether personal jurisdiction exists as to Philip Anschutz, Robin Szeliga, Robert Woodruff, Craig Slater and Afshin Mohebbi.

Philip Anschutz is Qwest founder and controlling shareholder and a corporate director who previously presided over Qwest Corporate Board. Plaintiff contends that Anschutz holds an ownership interest in New Jersey and a New Jersey Professional Team, the New Jersey MetroStars, a pro soccer team. Moreover, Anschutz is actively seeking assistance from New Jersey's government to help fund the stadium in Harrison, New Jersey, for the team.

Plaintiff contends that Anschutz fails to mention in his certification that he formerly employed Nacchio – that he formally employed Nacchio in New Jersey. Plaintiff points to an article and states [3] Anschutz flew to New Jersey to hire Nacchio and to seek his resignation. See Anthony Effinger, The Secrets of Philip Anschutz Bloomberg Markets, November 2002 at 46, Exhibit 1 to the certification of Michael D'Angelo.

Anschutz submits a further certification stating plaintiff's allegation that he personally owns the New Jersey MetroStars is false. Anschutz certifies that the MetroStars are owned by Anschutz New York Soccer Incorporated, a Colorado corporation. Anschutz New York Soccer Incorporated is a wholly-owned subsidiary of Anschutz Entertainment Group Incorporated, a Colorado Corporation. Anschutz Entertainment Group Incorporated

is a wholly-owned subsidiary of Anschutz Company and that's a corporation incorporated in Delaware. He owns – the defendant Anschutz owns all of the stock of the Anschutz Company.

Anschutz' certification indicates that he's a resident of Colorado. He's never lived in New Jersey, was not served in New Jersey, he's never filed income taxes in New Jersey, owns no property in New Jersey and leases no property in New Jersey. He states that he has no bank accounts in New Jersey, no telephone in New Jersey and no office in New Jersey. He does not advertise in New Jersey and does not employ anyone in New Jersey. Defendant states he did not participate in the June 20th, 2001 conference call referred to in the complaint in this action. He states that he's never met with William Trent at any location.

Robin Szeliga served as Qwest Executive Vice President, Finance and Chief Financial Officer since April 2001. From October 1999 to March of 2001 Szeliga was Senior Vice President of Finance. Szeliga is a certified public accountant.

Plaintiff alleges in the complaint in Paragraph 33 that fraudulent statements were made by Nacchio and Szeliga during an analyst conference call on or about June 20th, 2001 in which a New Jersey representative participated and relied upon representations made during that conference call. That is, William Trent, who is the State's designated representative and manager toward this investment portfolio.

At Paragraph 3 of her certification, Robin Szeliga admits that she conducted business in New Jersey on Qwest's behalf visiting the State twice and stayed several days in the state.

Plaintiff contends that she did not disclose her business contact and what communication she made in New Jersey.

Szeliga states in the certification that she had been an employee of Qwest since November of 1997, that she's a resident of Colorado and has been a resident of Colorado for more than ten years, has never lived in New Jersey, has never filed income taxes in [4] New Jersey, owns no property in New Jersey and leases no property in New Jersey. She states that she has no bank accounts in New Jersey.

Defendant states that she did not meet any of the representatives of the State of New Jersey or the plaintiff in this action, representatives of the State of New Jersey, specifically, William Trent or any other representatives of the Plaintiff, nor has she contacted any representative of the plaintiff in this action in order to solicit the purchase or sale of securities for any other purpose.

Robert Woodruff is a Qwest Director and Executive Vice President of Finance, Chief Financial Officer and Treasurer of Qwest. It was in 1997. Paragraph 14 of his certification states that he traveled to New Jersey for meetings in New Jersey. He does not disclose the frequency of the travel. The purpose for who he engaged in dealings with that is KMC or Global Crossing.

Woodruff states he is a resident of Colorado, was employed by Qwest from February of 1997 to March 2nd, 2001. He has never lived in New Jersey, was not served in New Jersey, has never filed income taxes in New Jersey, owns no property in New Jersey and leases no property in New Jersey. He states he has not bank accounts in New Jersey, no telephone in New Jersey and no office in New

Jersey. He does not advertise in New Jersey and does not employ anyone in New Jersey.

Defendant Woodruff states that he did not participate in the June 20th, 2001 conference call referred to in the complaint in this action. He states that he has never met with the plaintiff's representative, William Trent, at any location.

Craig Slater, a Qwest Director, serving on the Board's Compensation Committee and Executive Committee.

Slater states he is a resident of Colorado. Slater states – Slater's date of hiring by Qwest is unclear. He states that he conducts no business in New Jersey. He states that he's never met with William Trent in any location. And he states that he did not participate in the June 20, 2004 (sic) conference call. He certifies that he did not sign Qwest registration statements or any of the other SEC filings and documents described in the complaint.

He indicates that he is a resident of Colorado, he's never lived or held permanent employment in New Jersey, was not served in New Jersey, has never filed income taxes in New Jersey, owns no property in New Jersey, and leases no property in New Jersey. He states that he has no bank accounts or other assets in New Jersey, no telephone listing in New Jersey, or office in New Jersey. He does not advertise in New Jersey. He does not employ anyone in New Jersey. He [5] certifies that he has no business interest in New Jersey. He conducts no business here.

He also certifies that he had no personal meetings with the plaintiff about Qwest. He's never called the plaintiff about Qwest, written plaintiff about Qwest, faxed

plaintiff about Qwest, sending documents to plaintiff about Qwest or communicated.

Similarly, Afshin Mohebbi who joined Qwest in 1999 also contends that he has no contacts with this forum for which any jurisdiction, whether general or specific should attach.

The defendants contend that this Court does not have personal jurisdiction over them because plaintiff failed to establish personal jurisdiction in their complaint. Defendants claim that New Jersey does not allege any facts showing any of the moving defendants knowingly directed any of the allegedly false statements into New Jersey. According to defendant, New Jersey sought out statements made by the moving defendants in other jurisdictions not New Jersey. New Jersey's unilateral decision to rely on the statements made in other jurisdictions in making investment decisions does not lawfully entitle them to hail the moving defendants into court in this jurisdiction on any claim related to New Jersey's purchases.

None of the certifications submitted by defendants indicating statements, false or otherwise, were directed intentionally or just directed into New Jersey by defendants in any way related to this lawsuit. Defendants, therefore, argue that plaintiff cannot establish personal jurisdiction over them and the complaint must be dismissed as to these defendants.

Plaintiff maintains that the moving defendants along with Qwest's then CEO Nacchio, proceeded to implement the scheme to artificially inflate the share price of Qwest stock by entering into sham transactions and improperly accounting for those deals of the company's public financial statements.

According to plaintiff, a significant part of the scheme involved Qwest's participation and swap transactions with customers which appeared to substantially increase Qwest growth rate, revenues and earnings which, in fact, have no legitimate economic purpose. In these transactions, Qwest purportedly sold capacity on its optical telecommunications network to another carrier while simultaneously buying a nearly identical amount from the other carrier.

Plaintiff contends that such conduct violates generally accepted accounting principles and that Qwest recognized revenue from the sale and booked the corresponding purchases at capital expenditure rather than operating cost.

Plaintiff alleges each of the individually-[6]named defendants personally participated in profiting from the fraud. Collectively, plaintiffs allege that the individual defendants sold eleven million nine hundred three hundred fourteen shares of Qwest stock or 62 percent of their respective holdings or four hundred ninety million three hundred – I'm sorry – $490,003,766. Plaintiff contends that New Jersey purchased at least 4,000 shares of Qwest common stock or in excess of $147 million between November 2000 and November 2001 and that New Jersey purchased stock at prices as high as $54.40 per share, only later to hold the stock at a price of just over $1 per share.

On or after September 22nd, 2002 plaintiff contends that truth commits began to emerge and Qwest admitted to having committed accounting violations and that it would reinstate nearly one billion in revenues previously recognized.

Plaintiff's complaint alleges that Qwest entered into hundreds of millions of dollars of sham transactions with

Global Crossing, a limited liability corporation, and KMC Telecom Holdings, Incorporated. Both companies are headquartered in New Jersey. Plaintiff contends that these companies were a central part of the stock inflation subterfuge. The complaint contains four counts, three of which are relevant to the present motion, aiding and abetting fraud, negligent misrepresentation and breach of the fiduciary duty.

The moving defendants urge this Court to dismiss this complaint as to them for lack of jurisdiction because the jurisdictional discovery permitted by this Court unquestionably reveals that these defendants did not engage in any conduct for which either specific or general jurisdiction may be imposed as to each of them.

Plaintiff contends that jurisdictional discovery permitted by this Court establishes personal jurisdiction over the moving defendants.

New Jersey's law on statutes extends to the outermost limits permitted by the due process clause of the United States Constitution, Rule 4:4-4; *Jacobs v. Walt Disney World Company* 309 N.J. Super. 443. There are two types of personal jurisdictions, specific and general; *World-Wide Volkswagen Corp. v. Woodson* 444 U.S. 286.

Specific jurisdiction exists where defendants' activities are purposely directed to the form and the cause of action results from the alleged injuries that arise out of or relate to those activities; *Helicopteros Nacchionales de Colombia v. Hall* 466 U.S. 408, 411.

The threshold requirement for specific jurisdiction is the concept of minimum contacts where there is some act by which the defendant purposely [7] avails himself of the

privilege of conducting activities within the foreign state, thus, invoking the benefit and protection of its laws; *Hanson v. Denckla* 357 U.S. 235, citing *International Shoe v. Washington*, 326 U.S. 310, *Lebel v. Everglades Marina* 115 N.J. 317, where the New Jersey Supreme Court held that the minimum contacts required is satisfied so long as the contact resulted from the defendant's purposeful conduct and not the unilateral activities of the plaintiff. The purposeful contact requirement ensures that the defendant will not be hailed into a jurisdiction solely as a result of random, fortuitous or attenuating contacts; *Lebel*, 115 N.J. 323.

In determining jurisdiction over a defendant, the Court should consider whether the defendant's conduct, in connection with the foreign state such that he or she should have reasonably anticipated being hailed into court there. One isolated act, however, may be sufficient to subject a defendant to the jurisdiction of the forum; *Gendler and Company v. Telecom Equipment Corp.* A non-resident who is not doing business as stated in the traditional sense may nonetheless be amenable to sue in that state where the interest in the contract will have significant effects; 258 N.J. at 272.

Of course, it has been held that the mere transmittal of telephone calls to a foreign state without more is insufficient to suppose – to impose personal jurisdiction; see *Lebel*, 115 N.J. at 325.

General jurisdiction is assertive when the cause of action does not arise from or relate to the defendant's purposeful contact with the foreign state, but rather when there are continuing and systematic contacts between the non-resident defendant and the foreign state; *Gendler* 102

N.J. 478. This form of personal jurisdiction requires a plaintiff to show substantially more than near minimal contact to ensure that they are not subjecting a non-resident defendant to suit in the same manner as a resident of the forum; *Jacobs v. Walt Disney* 309 N.J. Super. at 452.

Thus, personal jurisdiction over the individually made defendant requires that this Court must find that the defendants purposely availed themselves of the privileges of conducting activities within the foreign state, or that their contacts were so continuous and systematic that they show substantially more than mere minimum contact, thus invoking the benefits and protections of this law. In weighing this efficiency of the contacts, the Court must consider whether the contact arose from the purposeful act of the foreign state or by the unilateral act of another party; *Waste Management et al. v. Admiral* at 138 N.J. 106.

For example, the New Jersey Supreme Court [8] found in the *Lebel* case that a Florida seller of luxury buildings became subject to New Jersey's jurisdiction when he telephoned his New Jersey buyer, mailed the sales contract to New Jersey and received payment from New Jersey.

The Court must, therefore, determine whether or not the specific facts supporting personal jurisdiction had been met as to each of the individually-named defendants. When a party raises a defense of personal jurisdiction, it is the plaintiff who bears the burden of establishing that defendants' contact is sufficient to confirm personal jurisdiction. Plaintiff points to *Elbco v. Struggle* 989 F. Sup. 69 for the proposition of factual discrepancies created

by affidavits are generally resolved in favor of the non-moving party. Against this backdraft the Court considers whether or not there are sufficient facts from which this Court can conclude that the plaintiff has met its burden of establishing personal jurisdiction over the individually-named defendants.

At the outset, this Court rejects the notion or the suggestion that, for purposeful conduct – for specific jurisdiction to the opposed, that the conduct must be specifically directed to New Jersey and literally directed to New Jersey physically. This Court accepts that the conduct may be directed to a number of foreign states – but if in – if the underlying intent or purpose of the conduct is directed to each forum, separate and independent of each other, the fact that conduct may have occurred in another state does not mean that it is not directed to – specifically directed to New Jersey.

In support of this position, the Court looks to the decision in *Gendler v. Telecom Equipment Corporation*. There, the Supreme Court, the opinion authored by Justice Pollock held that the stream of commerce theory supports the exercise of jurisdiction over non-resident manufacturer that knew, or reasonably should have known, of the distribution system through which its products were being sold in the foreign state.

The Court determined that, and I quote, "The stream of commerce theory by which a foreign corporation that delivers its products into the stream of commerce is held to have fair warning that it will be subject to suits in those states where consumers purchase its products constitutes a basis for asserting personal jurisdiction over a non-resident defendant."

In the field of investment and stocks stocks clearly the offering – the offerings and the registrations and the filings that are submitted are intended to attract investors and the investors are going to be state-wide or the investors will be both entities or persons throughout the various states and [9] worldwide, for that matter. And so that the nature of the product, that being the stocks, are such that it is reasonable to anticipate just as it is reasonable to anticipate for a manufacturer that there will be widespread distribution of product, that product, in this case, being shares in Qwest.

And again to that backdrop the Court as respect to Philip Anschutz' general jurisdiction. Plaintiff claims Anschutz is subject to general jurisdiction because he owns 100 percent of the stock in the Anschutz' company, which in turn owns 100 percent of Anschutz Group Incorporated, which in turn owns 100 percent Anschutz New York Soccer Incorporated, which in turn wholly owns the New York/New Jersey MetroStars Professional Soccer Team.

Plaintiff asserts further that general jurisdiction is appropriate because Anschutz owns stock in a public company, Regal Entertainment Group that has 13 movie theaters in New Jersey. In the absence of evidence in Anschutz' personal contacts in New Jersey in connection with these entities, his stock ownership in those companies does not establish general jurisdiction; *Pfundstein v. Omnicom Group Inc.* 285 N.J. Super. 245.

Plaintiffs also point to evidence in the record of Anschutz's regular travel to Teterboro Airport, repeated telephone contact with New Jersey and logging activities with State officials. Anschutz has asked this Court to

disregard this evidence because upon closer examination, the so-called logging consisted of one meeting with the Governor of New Jersey initiated by the Governor of New Jersey, 25 telephone calls to New Jersey over the course of four years and 14 occasions during which he either stopped over or passed through New Jersey at Teterboro Airport during a four-year period; citing *Helicopteros Nacchionales de Colombia, S.A. v. Hall* at 466 U.S. 408, specifically Page 418, defendants argue that no court has ever found general jurisdiction based upon such isolated or sporadic contact.

Anschutz's certification indicates that he's a resident of Colorado, as the Court has noted, and that he has never lived in New Jersey, nor engaged in any conduct from which it could be concluded that his contacts with New Jersey have been so systematic and continuous as to support general jurisdiction. Thus, based upon the Supreme Court's reasoning in *Helicopteros*, sporatic telephone calls from the stockholders a passenger stops at Teterboro Airport during a four-year period are insufficient to establish systematic and continuous contacts for purposes of asserting general jurisdiction.

With respect to specific jurisdiction, plaintiff states that Anschutz signed some of the [10] regulatory filings at issue in the present litigation. His position as a Director of Qwest and his direct dealings with Qwest CEO Defendant Nacchio has a basis for specific jurisdiction.

With respect to Nacchio, the record reveals that Anschutz personally recruited Nacchio in New Jersey, personally informed Nacchio in August of 1999 in a letter sent to Nacchio in New Jersey that Qwest was offering nine million Qwest stock options directly stock options to

Chiacchio (sic) – Nacchio, I'm sorry. The record reveals that he directly supervised and rated Nacchio's performance and sent Nacchio's compensation while he worked – while Nacchio worked at the Qwest New Jersey office.

Nacchio himself testified before the United States Senate hearing into Qwest activities, but he regularly discussed every major decision confronting Qwest. It is also noteworthy that Nacchio's contracts specifically permitted Nacchio to work out of the Qwest New Jersey office and it is clear from jurisdictional discovery that he spent considerable time in New Jersey at times working on behalf of Qwest.

On this evidence alone this Court finds sufficient prima facie evidence purposeful conduct directed to the State of New Jersey in connection with the acts and transactions which the claim derived. This Court does not find the fact that he recruited the Defendant Nacchio as evidence of purposeful conduct, but his involvement as a signatory and regulatory of filings, although they were not filed in New Jersey but they were filed with the SEC and his regularly – the fact that Nacchio regularly discussed every major decision confronting Qwest and the – and based upon the underlying allegations and the telephone calls and trips to New Jersey, the Court is satisfied that that is sufficient on its face to invoke personal jurisdiction over Philip Anschutz based upon specific jurisdiction.

The additional evidence of the telephone calls, the trips to the New Jersey area during the relevant time period strengthens plaintiff's claim that Anschutz regular communication that Anschutz engaged in regular communication with Nacchio.

Additionally, his signatures on the filings that took place during the period of time of the alleged complaint reports were being filed and released to the public, combined with what Nacchio described as discussions of every major business decision, convinces this Court that this is sufficient to invoke specific jurisdiction. That in so signing those regulatory documents, that he had to have known and he had to have expected, just as the manufacturer in *Gendler* had to expect, that he would be subject to suits in those states where the consumer of the product, that being [11] the investors into Qwest shares made such investments.

It is not without note that to the extent that New Jersey invested millions, millions of dollars into Qwest shares that that called for funds being moved out of New Jersey to Qwest Corporation. And that was facilitated, as alleged, by the defendants – as alleged by the plaintiffs with – by the conduct of the defendants. The defendants would have to know by their conduct, if proved, that such conduct would be purposely directed to investors, particularly investors such as the State of New Jersey.

Robin Szeliga joined Qwest in 1998 as the Vice President of Finance and continued to serve in that capacity through March of 2001. She became Chief Financial Officer in April 2001. Her responsibilities included signing form 10Ks, AKs, overseeing investor relations activies, as well as acting as a spokesperson for Qwest.

Jurisdictional discovery further revealed that she signed documents for SEC filings which purportedly contained false and misleading reports, issued a press release which contained statements attributed to her in response to a Morgan Stanley working report, about

Qwest's accounting irregularities and participated in the June 20th, 2001 conference call with Qwest investors that included New Jersey's representative, William Trent, in which representations were made that New Jersey relied upon in making a decision to continue to purchase Qwest stocks.

She was also directly copied with information regarding Qwest top institutional investors. For example, in the document listing 132 of Qwest's top investors, the State of New Jersey was listed as number 33.

Additionally, she was briefed and copied on documents regarding alleged swap transactions between Qwest and KMC, a New Jersey-based corporation. Defendant Szeliga dismisses plaintiff's contentions as a laundry list of unfocused incidental contact between Szeliga and New Jersey. This Court disagrees. The jurisdictional discovery reveals Szeliga's role as both Acting Chief Financial Officer and Chief Financial Officer was intimately involved in the day-to-day financial operations of Qwest beyond merely approving or signing regulatory filings.

Hence, this Court is satisfied the plaintiffs presented prima facie proof of conduct on her part, specifically directed to New Jersey to such an extent that she should have reasonably expected – that she should be subject to personal jurisdiction in connection with the acts and transactions from which the claims arise.

Robert Woodruff was a Director of Qwest and Executive Vice President of Finance, Chief Financial [12] Officer and Treasurer of Qwest from April 1997 to March 2nd, 2001. Between 1997 and 2001 he signed Form 10KQs, AKs, issued press releases touting Qwest's strong revenue position, directly reported to Defendant Nacchio and

continued to make representations as to the margins of improvement of Qwest.

Additionally, he performed accounting and finance functions. And the accounting and finance functions reported directly to him. He traveled to New Jersey to conduct Qwest business, including a visit to New Jersey to prepare Qwest's budget and to prepare for the issuance of earnings releases according to jurisdictional discovery.

He also approved the restructuring of New Jersey-based KMC Telecom Holdings receivable to which Qwest – to which receivables to Qwest, a transaction which plaintiff claims is part of Qwest's sham transactions, a subject of the within action. These activities demonstrate prima facie evidence to conduct purposely directed to the forum from which it may be inferred. They arose in connection with the present allegations.

The Court continues to rely upon the *Gendler* case by the way of analogy that the problem question here are the shares of stock in Qwest and the fact that those shares are essentially distributed in the stream of commerce because there's an opportunity to invest in Qwest by persons from many jurisdictions.

And it is noteworthy that New Jersey was listed as – under – as a top investor and so clearly, all of the individuals who were executives and engaged in the day-to-day operations and decision making of Qwest had to anticipate that the system through which the shares – that the stock of Qwest was marketed. That system is press releases, financial reports, SEC filings. That is the marketing basis upon which investors look to and rely upon. And so they had to expect that New Jersey would rely upon those representations.

And so this Court finds that by way of analogy is purposeful conduct directed to the foreign state and the fact that many states may have received this information does not, in any way, diminish the purposefulness of the conduct directed towards New Jersey.

Craig Slater has been a director of Qwest since 1987 and has served on Qwest Executive and Compensation Committees. He too signed financial statements and regulatory filings which plaintiff claims were transmitted to New Jersey. Plaintiff points to Slater's signing of regulatory filings as sufficient basis to exercise personal jurisdiction.

However, unlike Anschutz, Nachio, Woodruff and Szeliga, jurisdictional discovery reveals no other [13] involvement of filings other than what appears at this posture to be his pro forma signature, nor does the fact that he invested in New Jersey corporation Tellium, a basis to assert personal jurisdiction; see (indiscernible) Super. 285, NJ Super. at 252.

The Court is not satisfied that jurisdictional discovery has disclosed sufficient facts to justify hailing Craig Slater into New Jersey. And therefore the motion will be granted as to Craig Slater.

Afshin Mohebbi joined Qwest in 1999 and served as Chief Operating Officer. Plaintiff claimed that Mohebbi made many false and misleading representations to the State of New Jersey through SEC filings, press releases, financial statements that were disseminated to the plaintiff and relied upon by the plaintiff in making investment decisions.

The specific connote which plaintiff claims was directed to New Jersey involved the presentation made to investors in New York City in March 2001. After that presentation, Mohebbi met privately with to the plaintiff's representative William Trent in which he is alleged to falsely explain the Qwest large capital expenditures noted in the company's financial reports would result in the company's growth strategy. During his deposition, Mohebbi acknowledged that he spoke with Qwest CEO Defendant Nacchio when Nacchio was working out of New Jersey.

He was also involved with Qwest business dealings with New Jersey-based corporations KMC, Teilean and Global Crossings. Corporations which plaintiff claims were allegedly involved in the sham transactions.

Finally, jurisdictional discovery also reveals the transmittal of several reports to Mohebbi which listed the plaintiff as one of the largest holders of Qwest stock. This Court concludes that these contacts were sufficient to invoke personal jurisdiction over Mohebbi. Hence, this Court is satisfied that plaintiff has presented prima facie proof of conduct on Mohebbi's part, specifically directed to New Jersey in connection with the acts and the transactions from which the claims arise.

Therefore, the Court concludes, by way of summary, that the motions are denied as to all individually-named defendants – all individually named moving defendants except Craig Slater. The motion as to Craig Slater is granted.

Next is a motion by the defendant Arthur Andersen to dismiss for failure to state a claim the claim upon which

release can be granted. This motion concerns Arthur Andersen's accounting activities.

The complaint identifies a single actual undertaking of Andersen during the relevant time [14] period. Andersen issued its audit opinion on Qwest's financial statements for the year 2000. The opinion was included in Qwest's 2000 10K.

Plaintiff alleges that Andersen served as Qwest's independent public accountants and auditors until May 29th, 2002 when it was replaced by KPMG, LLP. Additionally, plaintiff alleges that Andersen blessed Qwest's swap transactions and the improper accounting practices therein. Plaintiff alleges Arthur Andersen aided and abetted fraud and negligent misrepresentation.

Defendants Andersen contend that they have statutory – he has a statutory immunity to these claims. The negligent misrepresentation claim should be dismissed because plaintiff fails to allege with sufficient particularity that Andersen made any false statements upon which plaintiff relied and New Jersey courts do not recognize aiding and abetting fraud against accountants. In any case, plaintiff's allegations are insufficient. Plaintiff, in reply, has dropped the negligent misrepresentation claim against Arthur Andersen.

Plaintiff contends, however, that the complainant states a claim against Arthur Andersen for aiding and abetting fraud under New Jersey law and N.J.S.A. 2A:53a-25 does not immunize Andersen from liability for its intentional conduct.

The standard under which a motion to dismiss is decided is well-established in New Jersey; *F.G. v. MacDonell*

291 N.J. Super. 262. Trial court should approach with great caution applications for dismissal based on the failure of a complaint stated claim under Rule 4:6-2e.

The test for determining adequacy of the pleading is whether a cause of action is to justify the facts. The inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. First in the analysis plaintiffs are entitled to have a complaint searched in depth with literality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taking – printing markers, sharp electronics. Therefore, every reasonable inference will be given to the plaintiff and the motion will only be granted in those rare instances and generally without prejudice.

N.J.S.A., according to Arthur Andersen, 2A:53a-25 prohibits plaintiff from bringing this action against Arthur Andersen predicated on the Andersen's request of financial statements. The accountant liability statute in pertinent part revised, notwithstanding the provision of any other law, no accountant shall be liable for damages for negligence arising out of, and in the course of rendering any [15] professional accounting service unless, (a) the claimant against the accountant was the accountant's client, or the accountant knew at the time of the engagement by the client or agreed with the client after the time of the engagement that the professional accounting service rendered to the client would be made available to the claimant who was specifically identified to the accountant in connection with a specified transaction made by the claimant, knew that the claimant intended to rely upon the professional accounting service in connection with that specified transaction, (c) directly expressed in the claimant

by words or conduct the accountant's understanding of the claimant's intended reliance in the professional accounting service.

Plaintiff and defendant agree that the New Jersey Legislature created a statute in response to the New Jersey Supreme Court's decision in *H. Rosenbloom, Incorporated v. Adam* 92 N.J. 324. However, a plaintiff contends that the statute applies only to negligent acts by accountants and not cases of fraud or aiding and abetting fraud. Defendant relies upon *Finderne Management Company v. Barrett* 355 N.J. Super. 197, arguing that the case clearly indicates the citation sponsored statement, that the Senate bill that the legislation enacted to limit accountant's liability of third parties for the accountant's negligent act. The bill restores the concept of privity between accountants and third parties as a condition preceding to imposition of liability.

Plaintiff cites *Garden Hire v. New Jersey Manufacturers*, an employment discrimination case, where the Court delineates the elements of a cause of action for aiding and abetting under the restatement.

However, the Court notes that in *Allegheny General Hospital v. Philip Morris, Incorporated*, 228 F.3d, the Third Circuit stated that aiding and abetting claims and conspiracy claims require an underlying tort cause of action. Here the underlying tort is a fraud committed by Qwest. If no fraud had been committed, there could be no claim for aiding and abetting, contrary to defendants' objection to the application of the three elements of aiding and abetting from the restatement. Not dispositive. I lost some pages.

(Tape off)

What is dispositive in this case is the Supreme Court's decision in May of this year in *Dickerson* – in the *Dickerson* case where the – go off the record.

(Tape off)

– is the *Dickerson* case where the Supreme Court recently affirmed the Appellate Division decision and unanimously affirmed. In *Dickerson, the* [16] *plaintiffs/ corporations owning and operating* supermarkets that were members or stockholders of Twin City Grocers Incorporated, a wholesale distributor of supermarket products. It was a cooperative organization serving the usual needs of its market members. Most of the individual owners of the supermarkets were also members of Twin City – Twin County Board of Directors. Twin County engaged Defendant Ernst & Young as its accountants to audit its books. The complaint alleged the annual audits were performed negligently for four years and as a result, failed to disclose that one of the directors perpetrated numerous frauds adversely affecting Twin County and the plaintiffs.

The Court concluded that the complaint neither alleged or applied satisfactorily any of the elements of the statute in Section B(2). Under the statute, the New – the State of New Jersey needs to allege that Arthur Andersen was identified by the State with respect to a specific transaction. Nowhere in the complaint does the State of New Jersey allege that Arthur Andersen was identified to them with regard to a specific transaction in compliance with N.J.S.A. 2A:53a-25-(5)(a) and (b), nor does the plaintiff comply with the requirements of b(2)(a) and (b). The accountant must know he thereafter must agree with the client that the work will be made available to a specifically

identified claimant in connection with the specified transaction made by the claimant.

Further, the accountant must have known that the claimant intended to rely on the services in connection with the specified transaction. Thus, plaintiff has failed to plead the tort of aiding and abetting with requisite particularity and in effect has failed to state a claim against Andersen upon which relief may be granted.

For that reason, the sole remaining count against Andersen is hereby dismissed.

* * *

[17] **CERTIFICATION**

I, MARY L. POLITO, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number CI 381-04 index number 1025 to 4308, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded, and to the best of my ability.

_____

MARY L. POLITO

APPROVED BY:

_____

JOHANNA LiMATO AOC #179
J&J COURT TRANSCRIBERS, INC. DATE: _____

SUPREME COURT OF NEW JERSEY
M-542 September Term 2006
60,222

STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF INVESTMENT, BY TREASURER JOHN MCCORMAC,
Plaintiff-Respondent,
v.
QWEST COMMUNICATIONS INTERNATIONAL, INC., et al.,
Defendants,
and
PHILIP F. ANSCHUTZ,
Defendant-Movant,
and
ARTHUR ANDERSEN, LLP,
Defendant-Respondent.

ORDER

(Filed Dec. 8, 2006)

This matter having been duly presented to the court, it is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable James R. Zazzali, Chief Justice, at Trenton, this 5th day of December, 2006.

/s/ Stephen Townsend
CLERK OF THE
SUPREME COURT

McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4096
(973) 622-4444
Attorneys for Defendants Philip
F. Anschutz, Joseph P. Nacchio,
Robin R. Szeliga, Robert S. Woodruff,
Stephen M. Jacobsen, Drake Tempest,
Marc B. Weisberg, James A. Smith,
Lewis O. Wilks, and Craig D. Slater

State of New Jersey, Department of Treasury, Division of Investment, by Treasurer John E. McCormac, Plaintiff, -against- Qwest Communications International, Inc., Philip F. Anschutz, Joseph P. Nacchio, Robin R. Szeliga, Robert S. Woodruff, Stephen M. Jacobsen, Drake Tempest, Marc B. Weisberg, James A. Smith, Lewis O. Wilks, and Craig D. Slater, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY DOCKET NO.: MER-L-3738-02 Civil Action **CERTIFICATION OF ROBERT S. WOODRUFF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

Robert S. Woodruff, of full age, hereby certifies as follows:

1. I am a defendant in this action and have personal knowledge of the facts contained in this Certification.

2. I am a resident of Colorado.

3. I was not served with process in this case in New Jersey.

4. I have never lived in New Jersey.

5. I have never leased or owned property in New Jersey.

6. I have never had a bank account in New Jersey.

7. I have never filed a New Jersey state individual income tax return.

8. I have never been a plaintiff in any lawsuit filed in New Jersey.

9. I have no telephone listings in New Jersey, and no office in New Jersey.

10. I do not advertise in New Jersey. I do not conduct business in New Jersey, and I do not employ anyone in New Jersey.

11. I was the Executive Vice President, Finance and Chief Financial Officer of Qwest Communications International, Inc. ("Qwest") from February 1997 to March 2, 2001. To the best of my recollection, I have never communicated with the State of New Jersey, Department of Treasury, Division of Investment ("plaintiff') in New Jersey about Qwest or its financial results; never met with plaintiff in New Jersey about Qwest; never called plaintiff in New Jersey about Qwest; never sent a facsimile to plaintiff in New Jersey about Qwest; and never sent any documents about Qwest to plaintiff in New Jersey.

12. I have no recollection of meeting William A. Trent in New Jersey or elsewhere.

13. After I left Qwest on March 2, 2001, I was no longer involved with the company, its financial statements, its financial reports or its accounting and business practices. Accordingly, I did not participate in the June 20, 2001 conference call referred to in the complaint in this action.

14. While employed at Qwest, I rarely traveled to New Jersey for meetings in New Jersey.

15. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Robert S. Woodruff
Robert S. Woodruff

DATED: March 5, 2002

McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4096
Tel: 973-622-4444

Attorneys for Defendants Philip F. Anschutz, Joseph P. Nacchio, Robin R. Szeliga, Robert S. Woodruff, Stephen M. Jacobsen, Drake Tempest, Marc B. Weisberg, James A. Smith, Lewis O. Wilks, and Craig D. Slater

State of New Jersey, Department of Treasury, Division of Investment, by Treasurer John E. McCormac,

Plaintiff,

-against-

Qwest Communications International, Inc., Philip F. Anschutz, Joseph P. Nacchio, Robin R. Szeliga, Robert S. Woodruff, Stephen M. Jacobsen, Drake Tempest, Marc B. Weisberg, James A. Smith, Lewis O. Wilks, and Craig D. Slater,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY
DOCKET NO.: MER-L-3738-02

Civil Action

CERTIFICATION OF ROBIN R. SZELIGA IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Robin R. Szeliga, of full age, hereby certifies as follows:

1. I am employee of Qwest Communications International, Inc. ("Qwest") and a defendant in this action. Except where otherwise indicated below, I have personal knowledge of the facts set forth below and if called upon to do so, I could and would so testify under oath.

2. I am a resident of the State of Colorado. I have resided in Colorado for more than ten years. I have never resided in the State of New Jersey. I have never held a job in which I was based in New Jersey. I have never leased or owned property in New Jersey. I have never had a bank account in New Jersey. I have never filed a New Jersey state income tax return.

3. I have been an employee of Qwest since November 1997. During this time period, my work did not involve servicing customers of Qwest in New Jersey. Although I sometimes flew in and out of New Jersey airports en route to other states, I have visited New Jersey on business only twice during the past five years. On each of those visits, I remained in New Jersey for no more than one or two days. I have never met with any representatives of the State of New Jersey or the plaintiff in this action in New Jersey. I have never contacted any representative of the plaintiff in this action in order to solicit the purchase or sale of securities or for any other purpose.

4. I certify under the laws of the State of New Jersey that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: March 4, 2003 /s/ Robin R. Szeliga
Robin R. Szeliga

(2)

Supreme Court, U.S.
FILED
APR 12 2007
OFFICE OF THE CLERK

No. 06-1241

IN THE

Supreme Court of the United States

ROBIN R. SZELIGA and ROBERT S. WOODRUFF,

Petitioners,

v.

STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF INVESTMENT, by TREASURER BRADLEY ABELOW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION

MERRILL G. DAVIDOFF
Counsel of Record
PETER NORDBERG
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Counsel for Respondent

208011

COUNSEL PRESS
(800) 274-3321 · (800) 359-6859

QUESTION PRESENTED

Whether this Court should grant extraordin interlocutory review of a ruling uphold New Jersey's exercise of personal jurisdiction o petitioners, where the ruling simply represent faithful and unexceptional application of this Cou well-settled personal jurisdiction jurisprudence.

BEST AVAILABLE COPY

PARTIES TO THE PROCEEDINGS BELOW

During the pendency of state appellate proceedings in this matter, Bradley Abelow succeeded John E. McCormac as New Jersey State Treasurer.

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STATEMENT OF THE CASE

This civil action was brought in New Jersey Superior Court, Mercer County, Law Division. Plaintiff/respondent is the State of New Jersey, Department of Treasury, Division of Investment ("NJT") – one of the fifty largest public or private money managers in the United States, with responsibility for managing pension funds for the retirement plans of over 600,000 active and retired New Jersey employees.

NJT's claims, for fraud and under other state common law theories, arise from substantial losses on its investment in over seven million shares of publicly traded common stock in Qwest Communications International, Inc. ("Qwest"). Pet. App. 5. Named as defendants in NJT's complaint were Qwest, its outside accountant Arthur Andersen, LLC ("Andersen"), and eleven of Qwest's officers and directors (the "Individual Defendants"). Pet. App. 22. Among the Individual Defendants are petitioners Robert S. Woodruff and Robin R. Szeliga, both of whom served, in succession, as Qwest's Chief Financial Officer during the relevant period. Pet. App. 6-7, 8-9.

NJT purchased its shares of Qwest stock between April 1999 and December 2001, at prices that were artificially inflated due to a series of misrepresentations of Qwest's earnings and assets. The misrepresentations, by petitioners and other defendants acting in concert with them, were made in public statements, press releases, filings with the United States Securities and Exchange Commission, and conference calls with investors in which a representative of NJT participated. Qwest has since

restated its earnings for the years 2000 and 2001. Pet. App. 5. The fraudulent statements were made in materials disseminated into New Jersey, with the knowledge, purpose, and intent that New Jersey investors such as NJT would purchase Qwest stock in reliance on them. Pet. App. 14-15.

Several of the Individual Defendants, including petitioners, moved to dismiss for lack of personal jurisdiction. The Law Division denied the motion. On interlocutory appeal, the Appellate Division affirmed on August 18, 2006. Pet. App. 1-20. Its opinion is now reported as *State, Dep't of Treasury, Div. of Inv. ex rel. McCormac v. Qwest Commc'ns Int'l, Inc.*, 387 N.J. Super. 487, 904 A.2d 786 (App. Div. 2006). The New Jersey Supreme Court denied review on December 8, 2006. Pet. App. 46. The instant petition for certiorari followed. One of the other Individual Defendants, Philip F. Anschutz, has filed a separate petition for certiorari in this Court, docketed as No. 06-1235, seeking review of the same order.

The underlying claims against Qwest, Andersen, and the other defendants remain pending in the Law Division, with trial expected in 2008.

REASONS FOR DENYING THE PETITION

In a vain effort to transform a garden-variety ruling on personal jurisdiction into grist for interlocutory review in this Court, petitioners rewrite not only the factual record but also the New Jersey Superior Court's decision in this case. The Appellate Division did not in fact adopt any sweeping holding that "foreseeability alone is sufficient as a jurisdictional hook," as petitioners would have it.

Pet. at 19. Neither did it hold that "the vicarious liability of conspiracy law can support a vicarious exercise of jurisdiction." Pet. at 28. Rather, the Appellate Division applied the long-settled teachings of this Court to uphold specific jurisdiction over defendants, including petitioners, whose fraudulent communications were disseminated into New Jersey with the knowledge, intention, and expectation that investors like NJT would purchase Qwest securities in reliance on defendants' misrepresentations. That ruling is unexotic and certainly supplies no occasion for extraordinary interlocutory intervention by this Court. All necessary guidance was already supplied by numerous previous decisions of this Court, which the Appellate Division faithfully applied.

As the Appellate Division correctly noted, *see* Pet. App. at 11, petitioners have raised no argument on appeal that New Jersey's exercise of personal jurisdiction offends traditional notions of "fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). Personal jurisdiction therefore depends solely on the familiar question whether defendants purposefully established "minimum contacts" in the forum state. *E.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

The facts on which the Law Division and Appellate Division both found that test to be satisfied are aptly summarized in the Appellate Division's opinion. *See* Pet. App. 4-10. In fall 1996, when Qwest was considering a public offering of its stock, its chairman Philip Anschutz met with petitioners' co-defendant Joseph P. Nacchio in New Jersey to discuss Nacchio's joining Qwest as CEO. Once hired

in that capacity, Nacchio worked both from Qwest's headquarters in Denver, Colorado, and from its newly opened offices in New Jersey.

During their respective tenures as CFO, both petitioners reported to Nacchio. After Qwest went public, it added an investor relations division, which reported to the CFO. The investor relations division communicated with shareholders and the investment community; press releases and SEC filings were sent to investors who requested information. An NJT representative received that information in New Jersey: These materials included SEC filings and press releases, signed and approved by petitioners themselves, touting Qwest's strong revenue growth. In fact, however, Qwest's revenues were fraudulently inflated through such devices as the false reporting of "swap" transactions, in which network capacity was sold and repurchased, with the putative "sales" reported as revenue. Woodruff also traveled to New Jersey to woo investors and as part of the budgeting and earnings release processes. Szeliga personally participated in an investor conference call that a representative of NJT attended.

To these facts, the Law Division and Appellate Division applied well-settled law to find that petitioners and the other moving Individual Defendants had sufficient contacts with New Jersey to support specific jurisdiction. Nothing about those rulings departed in any way from this Court's precedents. This is not a case, in particular, in which personal jurisdiction is asserted over a defendant who merely placed some commodity in the general stream of commerce, with the commodity then traveling by happenstance to a forum state where the defendant

had never conducted business or transmitted communications. *Cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Rather, it involves fraudulent statements knowingly and intentionally disseminated, to New Jersey specifically and to other jurisdictions as well, for the specific purpose of providing information to investors on which they might rely, and did rely, in their purchase of Qwest securities. As the Appellate Division correctly observed: "Fraudulent communications are at the center of this controversy. NJT's claims are based on its assertion that it was injured as a consequence of intentionally false statements about the financial health of Qwest that were disseminated in this State and upon which NJT relied in investing public funds." Pet. App. 11.

The Appellate Division's analysis enjoys solid foundations in numerous decisions from this Court, including decisions involving personal jurisdiction in intentional tort cases based on communications purposefully disseminated into a state with the knowledge or intention that they will cause harm within that state. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984). Indeed, petitioners offer no basis on which to distinguish *Calder*, save for an argument that the fraudulent communications at issue here were also transmitted to investors in other states, in addition to New Jersey. Nothing in this Court's personal jurisdiction jurisprudence suggests, however, that a defendant may defeat personal jurisdiction in one forum by the simple artifice of transmitting the same fraudulent representations to residents of other jurisdictions in the course of the defendant's broader tortious endeavors. Such a rule

would have the perverse result that the greater the geographic scope of the defendant's tortious conduct, the less amenable to specific jurisdiction the defendant would be in any jurisdiction but the defendant's own domicile.

Nor did the Appellate Division rest its decision on any notion that a plaintiff's bare allegation of conspiracy warrants imputation of each conspirator's forum contacts to all co-conspirators. Quite the contrary, the Appellate Division expressly stated that "the actions and knowledge of each [defendant] must be considered individually not in the aggregate," Pet. App. 14, and its opinion does exactly that. *See, e.g.*, Pet. App. 8-9, 14-15.

A writ of certiorari would be inappropriate in any event, because the decisions of the Law Division and Appellate Division are interlocutory, not final. This Court rarely grants certiorari to review interlocutory judgments. *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993). As this Court has recognized, the fact that a party must proceed in litigation is not a ground for such review. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967). Premature review may involve the Court in unnecessary constitutional adjudication and should therefore be avoided. *See* Justice Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983). Accordingly, as a general rule, this Court will not issue a writ of certiorari to review an interlocutory decree, unless it is necessary to prevent extraordinary inconvenience and embarrassment to the conduct of the case. *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). There is no such necessity here. Discovery is

still underway in the Law Division, and the Appellate Division's opinion specifically notes that information coming to light as discovery progresses may bear on personal jurisdiction. Pet. App. 20. Petitioner will be free to pursue appellate relief after final judgment. Review at this stage is both unnecessary and premature.

CONCLUSION

For the reasons given, respondent respectfully requests that the honorable members of this Court deny the instant petition for a writ of certiorari.

Respectfully submitted,

MERRILL G. DAVIDOFF
Counsel of Record
PETER NORDBERG
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Counsel for Respondent